# Enforcing Personal Protection Orders

CHAPTER 8

### In This Chapter...



## 8.1 Chapter Overview

This chapter addresses enforcement of personal protection orders issued under the domestic relationship PPO statute (MCL 600.2950) or the non-domestic stalking PPO statute (MCL 600.2950a), and PPOs issued by other states, Indian tribes, or U.S. territories.* The discussion begins with an overview of the enforcement provisions in the PPO statutes and court rules, which provide for contempt sanctions for violation of a PPO. It then explores the following questions that arise in applying these provisions to alleged PPO violations:

- Are civil or criminal contempt sanctions appropriate for a particular PPO violation?
- What due process protections apply in contempt proceedings generally?
- What are the specific procedural requirements for criminal contempt proceedings instituted by warrantless arrest of an alleged adult offender?
- What procedures apply to contempt proceedings against an alleged adult offender that are initiated by an order to show cause?
- What enforcement procedures apply when the alleged offender is under age 18?
- What sentence or disposition may the court impose upon an individual found guilty of contempt?

*For a discussion of the issuance of PPOs, see Chapters 6 and 7.

- What application do constitutional guarantees against double jeopardy have in contempt proceedings regarding behavior that also constitutes a criminal offense?
- What effect do civil protection orders against domestic violence have in other jurisdictions?

## 8.2 Overview of PPO Enforcement Provisions

A personal protection order without enforcement offers scant protection at best and at worst increases the danger to the petitioner by creating a false sense of security. The Michigan Legislature has provided for enforcement of PPOs by way of the courts' contempt powers. Both the domestic relationship and non-domestic stalking PPO statutes authorize imposition of civil and criminal contempt sanctions upon conviction of a PPO violation — criminal contempt sanctions are most commonly appropriate in cases involving assaultive or threatening behavior.*

*Because PPO violations typically occur outside the court's presence, this chapter assumes that the respondent faces charges of indirect contempt. For a discussion of direct contempt (i.e., contempt committed in the immediate view and presence of a sitting court), see *Contempt of Court Benchguide (Revised Edition)* (MJI, 2000), Section 2.4.

**Note:** Under the Michigan Court Rules, a PPO is defined to include a "foreign protection order" enforceable in Michigan under MCL 600.2950*l*. MCR 3.708(A)(1) and MCR 3.982(A). A "foreign protection order" is:

> "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." MCL 600.2950h(a).

A "foreign protection order" does not include an order issued in another country.

The PPO statutes provide for criminal contempt sanctions as follows:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, shall be imprisoned for not more than 93 days and may be fined not more than $500.00. An individual who is less than 17 years of age and who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in MCL 712A.18. . . . " MCL

600.2950(23) and MCL 600.2950a(20). See also MCR 3.708(H)(5)(a) and MCR 3.988(D).

The PPO statutes also authorize imposition of sanctions under the general contempt provisions of the Revised Judicature Act ("RJA"):

> "A personal protection order issued under this section is also enforceable under [MCL 600.1701 et seq.]." MCL 600.2950(26) and MCL 600.2950a(24).

The general contempt provisions of the RJA authorize the imposition of either criminal or civil contempt sanctions, both of which can involve imprisonment and fines. However, the general penalties for criminal contempt set forth in MCL 600.1715(1) are superseded by the more specific provisions of the PPO statutes. See MCR 3.708(H)(5)(a), MCR 3.988(D), and *Wayne County Prosecutor v Wayne Circuit Judge*, 154 Mich App 216, 221 (1986). If the court determines that civil contempt is the appropriate sanction, it may impose a fine of not more than $250.00 and/or a prison term of indeterminate length under MCL 600.1715(2). See also MCR 3.708(H)(5)(b) and MCR 3.988(D)(2)(a).

In both civil and criminal contempt cases, the RJA further authorizes compensation to injured parties for loss or injury resulting from violation of a court's order:

> "If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." MCL 600.1721. See also MCR 3.708(H)(5) and MCR 3.988(D).

In addition to the foregoing statutory penalties, MCR 3.708(H)(5) provides that upon conviction of civil or criminal contempt, "the court may impose other conditions to the personal protection order." MCR 3.988(D)(3) contains a similar provision applicable to PPOs issued against respondents under age 18.

Under the PPO statutes and MCR 3.708, contempt proceedings against an adult age 18 or older may be initiated in one of two ways:

- Criminal contempt proceedings may be initiated by **warrantless arrest** under MCL 764.15b. See also MCL 600.2950(25) and MCL 600.2950a(22).
- If the respondent has not been arrested for the alleged violation, the petitioner may initiate contempt proceedings by way of a **motion to show cause**. MCR 3.708(B).

In cases where a respondent under age 18 has allegedly violated a PPO, enforcement proceedings are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A) and 3.982(B). Court action to enforce a PPO against a respondent under age 18 is initiated by a supplemental petition that may be filed by the original petitioner, a law enforcement officer, a prosecutor, a probation officer, or a caseworker. MCR 3.983(A). The supplemental petition must contain a specific description of the facts constituting a violation of the PPO. *Id*. Upon receipt of a supplemental petition, the court must either set a date for a preliminary hearing and issue a summons to appear, or issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent. MCR 3.983(B). A law enforcement officer may also apprehend a respondent under age 18 without a court order for violating a PPO. MCL 712A.14(1). In that case, the officer is responsible to ensure that the supplemental petition is prepared and filed with the court. MCR 3.984(B)(4).

*For a more detailed treatment of contempt, see *Contempt of Court Benchguide (Revised Edition)* (MJI, 2000).

At common law, the character and purpose of the punishment determines whether criminal or civil contempt sanctions are appropriate. *In re Contempt of Dougherty*, 429 Mich 81, 92 (1987). The extent to which Michigan's PPO statutes depart from the common law of contempt has not been addressed by the state's appellate courts. Nonetheless, the statutes' authorization of both criminal and civil contempt sanctions requires the court to consult the common law for guidance as to when each type of sanction is appropriate. Accordingly, the sections that follow provide a brief general discussion of the Michigan common law governing contempt.*

## 8.3 Distinguishing Criminal and Civil Contempt

*See Section 8.4 for other due process requirements.

The first analytical step in any contempt proceeding is to determine whether the alleged violation is subject to civil or criminal contempt sanctions. This step is critical because due process requires that a person charged with contempt be informed at the outset whether the proceedings involve civil or criminal contempt.* *In re Contempt of Rochlin,* 186 Mich App 639, 649 (1990), and *Jaikins v Jaikins,* 12 Mich App 115, 120 (1968). This section explores the substantive differences between civil and criminal contempt.

### A. Elements of Criminal Contempt

Criminal contempt sanctions are punitive in nature. A person convicted of criminal contempt is subject to imprisonment and fines, which are imposed to vindicate the authority of the court when the contemnor has done "that which he has been commanded not to do." *In re Contempt of Dougherty*, 429 Mich 81, 93-94 (1987), citing *Gompers v Bucks Stove & Range Co*, 221 US 418, 441-443 (1911). Criminal contempt sanctions are appropriate where all of the following prerequisites are met:

- The contemnor acts with intent, in "wilful disregard or disobedience of the authority or orders of the court." *People v Matish,* 384 Mich 568, 572 (1971), and *People v Kurz,* 35 Mich App 643, 652 (1971).
- The contemnor cannot be coerced to comply with the court's order because the violation has altered the status quo so that it cannot be restored or the relief intended has become impossible. Coercive fines or imprisonment are likely to be futile in cases where the acts constituting the violation of the court's order were completed prior to the time when the sanctions are imposed. *In re Contempt of Dougherty*, *supra,* 429 Mich at 100, and *Jaikins v Jaikins,* 12 Mich App 115, 121 (1968).
- The court's purpose is to remedy acts constituting an imminent threat to the orderly administration of justice and to vindicate its own authority by punishing the contemnor. *In re Contempt of Rochlin,* 186 Mich App 639, 648 (1990).

The court has no power to impose either criminal or civil contempt sanctions where a party has indicated only that it intends to disobey a court order in the future. *In re Contempt of Dougherty*, *supra,* 429 Mich at 106-107.

The foregoing prerequisites are satisfied in most cases where the alleged PPO violation involves assaultive or threatening behavior against persons, animals, or property. In these cases, the alleged violation is generally not ongoing at the time the court imposes sanctions, so that coercive sanctions will be futile. Where there is no way to coerce the respondent to comply with the PPO, the court can only punish the offending behavior by imposing criminal contempt sanctions.

> **Note:** If assaultive behavior occurs in the court's presence during a court proceeding, direct contempt sanctions are appropriate. See *Contempt of Court Benchguide (Revised Edition)* (MJI, 2000), Section 2.4.

## B. Elements of Civil Contempt

Civil contempt sanctions are imposed for the benefit of the complainant and have the remedial purpose of restoring the status quo that has been disturbed by a violation of a court order. *Gompers v Bucks Stove & Range Co*, 221 US 418, 441 (1911). Civil contempt sanctions are either coercive or compensatory.

- Coercive sanctions involve imprisonment or fines imposed to compel the contemnor's performance of an act in compliance with a court order. MCL 600.1715(2).
- Compensatory sanctions are imposed to restore an injured party who has suffered actual economic losses as a result of the contemptuous conduct. Compensatory sanctions can be awarded incident to either civil or criminal contempt proceedings. See MCL 600.1721, which is discussed at Section 8.9(C).

Intent to violate the court's order is *not* a required element of civil contempt. *Catsman v City of Flint*, 18 Mich App 641, 646 (1969). See also *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501 (2000) (In civil contempt proceeding, "the circuit court had to find that respondent was neglectful or violated its duty to obey an order of the court.") Coercive civil contempt sanctions are appropriate in cases where the following prerequisites are met:

- The sanction will restore the status quo by forcing the contemnor to take a desired action or cease ongoing harmful conduct. Coercive sanctions are often appropriate in cases where the acts constituting the violation of the court's order are continuing at the time when the sanctions are imposed. *In re Contempt of Dougherty*, 429 Mich 81, 100 (1987) and *Jaikins v Jaikins,* 12 Mich App 115, 121 (1968).
- The contemnor has the ability to do the act that the court has ordered. Civil contempt sanctions must end when the contemnor complies with the court's order or loses the ability to comply. See MCL 600.1715(2), *Jaikins v Jaikins, supra,* 12 Mich App at 121-122, and *People v McCartney*, 132 Mich App 547, 557 (1984), vacated on other grounds and remanded 141 Mich App 591 (1985).

The court has no power to impose any type of contempt sanction where a party has indicated only that it intends to disobey a court order in the future. *In re Contempt of Dougherty*, *supra,* 429 Mich at 106-107.

Coercive civil contempt sanctions will generally *not* be appropriate in a PPO action where the respondent is charged with violating a prohibition against assaultive or threatening behavior. In such cases, the essence of the court's order is to *restrain* the respondent from offensive behavior, not to mandate action by the respondent. Moreover, in most cases involving assaults or threats, the alleged violation will not be continuing, so that coercive sanctions will not be effective to bring the respondent into compliance with the court's order or undo any injury the violation has caused. Contemnors in these types of cases can only be punished for their behavior and should be subject to criminal contempt proceedings.

The following discussion sets forth typical factual situations in which courts impose coercive civil contempt sanctions.

### 1. Failure to Perform an Action Mandated by the Court

Civil contempt sanctions are commonly imposed where an individual is accused of failing or refusing to perform an action within his or her power that has been mandated by a court order. In these cases, civil contempt sanctions are imposed to coerce the contemnor to perform a court-ordered act that will restore the status quo. Cases of this nature include failures to pay spousal support, surrender property, or make a conveyance required by a decree for specific performance. In these types of cases, contemnors are properly subject to coercive fines or imprisonment until they perform or become unable to do so. *In re Contempt of Dougherty*, *supra,* 429 Mich at 93.

In the context of a PPO action, a respondent's refusal or failure to do an action ordered by the court may take the following forms:

- Failure or refusal to relinquish a firearm or other weapon.
- Failure or refusal to relinquish property to the petitioner.
- Detention of children in violation of a court order.

### 2. Contemnor in Continuing Violation of a Court Order

Less frequently, courts impose civil contempt sanctions on individuals who have done acts that the court has forbidden. If the contemnor's act violates a court order, civil contempt sanctions are appropriate if the contemnor is in continuing violation of the court's order at the time of imposing sanctions, and if the coercive sanction will bring the contemnor into compliance with the court's order. One example of this type of coercive sanction is a monetary fine imposed for each day a contemnor remains on strike in violation of a court order. *In re Contempt of Dougherty*, *supra,* 429 Mich at 99-100. See also MCL 600.1715(1).

In the context of a PPO action, forbidden behavior that may be subject to civil contempt sanctions might include:

- Possession of a firearm or other weapon.
- Disbursement of family property.
- Interference with the petitioner's efforts to remove children or personal property from premises solely owned or leased by the respondent.

## 8.4 Due Process in Contempt Proceedings Generally

The Michigan Supreme Court has applied most, but not all, criminal due process protections to contempt proceedings. The Court's due process analysis in contempt cases starts from the assumption that contempt is an anomalous proceeding. On the one hand, the Court has noted that "all contempts may be said to be criminal in nature because they permit imprisoning a contemnor for wilfully failing to comply with an order of the court." *In re Contempt of Dougherty*, 429 Mich 81, 90 (1987). On the other hand, the Court has recognized that contempt is "neither wholly civil nor altogether criminal." *Id.* at 91. Accordingly, the Supreme Court has not focused on the civil or criminal nature of the contempt proceedings in determining what due process requires in a particular case; rather, the Court's due process inquiry poses the question whether the proceedings will result in the deprivation of physical liberty. *Mead v Batchlor*, 435 Mich 480, 498 (1990).

The liberty interests at stake in contempt proceedings have led Michigan's appellate courts to conclude that most criminal due process protections apply

regardless of the civil or criminal nature of the contempt. The following criminal due process protections apply to contempt cases:

*PPO enforcement is unique in that the Legislature has made special provisions for initiation of criminal contempt proceedings after warrantless arrest. See Sections 8.5-8.6.

- If a contempt proceeding is for acts committed outside the immediate view and presence of the court and is initiated by a motion to show cause, the motion must be supported by the affidavit of a person who witnessed or has personal knowledge of the acts charged. In determining whether an affidavit states facts constituting the commission of contemptuous conduct, a trial judge can rely on the stated facts as well as on legitimate inferences drawn therefrom. *Michigan v Powers*, 97 Mich App 166, 168 (1980), and *In re Contempt of Robertson,* 209 Mich App 433, 438-439 (1995).*
- A person charged with contempt must be informed whether the proceedings against him or her involve civil or criminal contempt sanctions. *In re Contempt of Auto Club Insurance Ass'n*, 243 Mich App 697, 716 (2001), *In re Contempt of Rochlin,* 186 Mich App 639, 649 (1990), and *Jaikins v Jaikins,* 12 Mich App 115, 120 (1968).
- The accused must be advised of the charges, afforded a hearing on the charges, and given a reasonable time in which to prepare a defense. *In re Contempt of Robertson, supra*, 209 Mich App at 438.
- An indigent defendant may not be incarcerated following a civil or criminal contempt proceeding where the assistance of counsel has been denied. *Mead v Batchlor, supra,* 435 Mich at 505-506.
- The rules of evidence apply at the hearing regarding nonsummary civil and criminal contempt charges. MCR 3.708(H)(3), MRE 1101(a), and *In re Contempt of Robertson, supra*, 209 Mich App at 439.
- The Double Jeopardy Clause applies in any proceeding where a punitive sanction is imposed. *People v McCartney (On Remand)*, 141 Mich App 591, 593 (1985), and *People v Artman*, 218 Mich App 236, 246 (1996). See also *United States v Dixon*, 509 US 688 (1993) (double jeopardy applies to nonsummary criminal contempt proceedings). Section 8.12 contains further discussion of double jeopardy.
- In a civil contempt proceeding arising from an individual's failure to pay court-ordered child support, the court may not jail a person unless a stenographic record is made. Moreover, the court should make careful inquiry into the individual's present ability to pay; incarceration is inappropriate in such cases absent findings supported by substantial evidence that the individual has the ability to perform the condition of the proposed order of confinement. *Mead v Batchlor*, *supra*, 435 Mich at 506.

Despite its recognition of the fundamental liberty interests at stake in all contempt proceedings, the Michigan Supreme Court has not extended to them the full panoply of due process protections that apply in ordinary misdemeanor or felony cases. *In re Contempt of Dougherty*, *supra*, 429 Mich at 91. With respect to due process, contempt proceedings differ from criminal proceedings in two ways:

- The reasonable doubt standard is applicable to criminal contempt cases only. MCR 3.708(H)(3), MCR 3.987(F), and *Michigan v Powers, supra*, 97 Mich App at 171. In civil contempt cases, the Michigan appellate courts have applied either a preponderance of the

evidence standard (*Jaikins v Jaikins*, 12 Mich App 115, 121 (1968)) or a "clear and unequivocal" standard (*People v Matish*, 384 Mich 568, 572 (1971)). In PPO actions involving an adult respondent, MCR 3.708(H)(3) states that the petitioner or prosecuting attorney must prove the respondent's guilt of civil contempt "by clear and convincing evidence." In actions to enforce a PPO against a respondent under age 18, MCR 3.987(F) provides for proof of guilt of civil contempt by a preponderance of the evidence.

- Individuals accused of civil or criminal contempt have no right to a jury trial. See *People v Antkoviak,* 242 Mich App 424, 472 (2000). In *Cross Co v UAW Local No 155*, 377 Mich 202, 211 (1966), the Michigan Supreme Court cited the need "to enforce orders . . . with speed and dispatch" as justification for its holding that a jury trial was not required in a criminal contempt proceeding arising from acts allegedly in violation of an injunction against illegal picketing during a labor dispute.

  **Note:** The Sixth Amendment to the U.S. Constitution establishes the floor for denying a jury trial in Michigan contempt cases because Michigan law confers no independent right. *People v Antkoviak, supra.* The U.S. Supreme Court has held that petty offenses may be tried without a jury. In deciding whether an offense is "petty," the most relevant criterion is the severity of the penalty authorized; where no maximum penalty is authorized, the Court considers the severity of the penalty actually imposed. *Frank v United States*, 395 US 147, 148-149 (1969). In *Frank*, the Court upheld a three-year sentence of probation that was imposed without a jury trial on an individual convicted of criminal contempt for violating an injunction. The Court reasoned that this sentence was within the limits of the congressional definition of petty offense, so that a jury trial was not required. The Court further held that criminal contempt sentences of up to six months may be constitutionally imposed without a jury trial. *Id.* at 150. Regarding imposition of fines for contempt without a jury trial, see *United Mine Workers v Bagwell*, 512 US 821 (1994) (imposition of "serious" fines of over $64 million constituted criminal contempt, which could only be imposed after a jury trial) and *Muniz v Hoffman,* 422 US 454 (1975) (a $10,000 fine against a union convicted of criminal contempt was not of such magnitude that the union was entitled to a jury trial).

The statutes and court rules governing PPO enforcement proceedings incorporate the foregoing general due process requirements, making detailed provision for such things as adequate notice of the charges, appointment of counsel, and proof beyond a reasonable doubt in criminal contempt cases. Sections 8.5 through 8.11 outline in detail the procedural steps for PPO enforcement proceedings as set forth in these statutes and court rules.

## 8.5 Initiating Criminal Contempt Proceedings by Warrantless Arrest

*State Police officers may also make warrantless arrests for PPO violations. MCL 28.6(5).

MCL 764.15b authorizes law enforcement officers to arrest an individual named in a PPO without a warrant upon reasonable cause to believe that the individual is violating or has violated the order.* This section sets forth the prerequisites to warrantless arrest under the statute. The discussion assumes an adult respondent and applies to domestic relationship, non-domestic stalking, and foreign PPOs. Enforcement procedures for cases involving respondents under age 18 are addressed in Section 8.11.

### A. Notice Prerequisites to Warrantless Arrest

*See Section 8.13 for more information on full faith and credit of PPOs.

A PPO is effective and immediately enforceable upon a judge's signature. An ex parte PPO is effective immediately, without written or oral notice to the respondent, and before entry into the LEIN system. MCL 600.2950(9),(12), (18) and MCL 600.2950a(6), (9), (15). In order for a PPO to be effective in another state, Indian tribal territory, or U.S. territory, a PPO must be served on the respondent. MCL 600.2950(9) and MCL 600.2950a(6).*

Once in effect, a PPO is enforceable anywhere in Michigan, by any law enforcement agency that:

- Has received a true copy of the PPO;
- Is shown a copy of the PPO (i.e., by the petitioner); *or*
- Has verified the existence of the PPO on the LEIN network.*

*MCL 600.2950(21) and MCL 600.2950a(18).

A law enforcement officer shall enforce a PPO if *any one* of the foregoing conditions is met. If the officer is shown a copy of the PPO, for example, he or she must enforce it even if it has not been served on the respondent or entered into the LEIN system.

*The NCIC protection order file is maintained by the FBI. MCL 600.2950h. See Section 8.13 for information on "valid" foreign protection orders.

If a law enforcement officer is shown a copy of a foreign PPO but the officer can not verify the order on LEIN or the National Crime Information Center ("NCIC") protection order file, the officer must still enforce the foreign PPO unless it is apparent that the order is invalid.* MCL 600.2950*l*(4). The law enforcement officer may rely upon the statement of the petitioner that the foreign protection order that has been shown to the officer remains in effect and may rely upon the statement of the petitioner or the respondent that the respondent has received notice of that order. *Id.*

If a law enforcement officer is presented with a copy of a foreign PPO, from any source, the officer may rely upon the copy of the foreign PPO if it appears to contain all of the following:

"(a) The names of the parties.

"(b) The date the protection order was issued, which is prior to the date when enforcement is sought.

"(c) The terms and conditions against respondent.*

"(d) The name of the issuing court.

"(e) The signature of or on behalf of a judicial officer.

"(f) No obvious indication that the order is invalid, such as an expiration date that is before the date enforcement is sought." MCL 600.2950*l*(3)(a)-(f).

*A foreign protection order must be enforced even though it contains provisions that are unavailable under Michigan's PPO statutes.

If the person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, the law enforcement officer shall attempt to verify the existence of the foreign protection order and all of the following:

"(a) The names of the parties.

"(b) The date the foreign protection order was issued, which is prior to the date when enforcement is sought.

"(c) Terms and conditions against respondent.

"(d) The name of the issuing court.

"(e) No obvious indication that the foreign protection order is invalid, such as an expiration date that is before the date enforcement is sought." MCL 600.2950*l*(5)(a)-(e).

Verification can be done through LEIN or the NCIC protection order file, administrative messaging, contacting the court that issued the foreign protection order, contacting the law enforcement agency in the issuing jurisdiction, contacting the issuing jurisdiction's protection order registry, or any other method the law enforcement officer believes to be reliable. MCL 600.2950*l*(5). If the existence of the order and information listed in 600.2950*l*(5)(a)-(e) is verified, the officer may enforce the order. If there is no copy of the order and no verification, the officer should maintain the peace and take appropriate action regarding criminal violations.

If the respondent has not been served with or received notice of a foreign PPO, the law enforcement officer must serve the respondent. MCL 600.2950*l*(9) states:

"If there is no evidence that the respondent has been served with or received notice of the foreign protection order, the law enforcement officer shall serve the respondent with a copy of the foreign protection order, or advise the respondent about the existence of the foreign protection order, the name of the issuing

> court, the specific conduct enjoined, the penalties for violating the order in this state, and, if the officer is aware of the penalties in the issuing jurisdiction, the penalties for violating the order in the issuing jurisdiction. The law officer shall enforce the foreign protection order and shall provide the petitioner, or cause the petitioner to be provided, with proof of service or proof of oral notice. . . . If there is no evidence that the respondent has received notice of the foreign protection order, the respondent shall be given an opportunity to comply with the foreign protection order before the officer makes a custodial arrest for violation of the foreign protection order. The failure to comply immediately with the foreign protection order is grounds for an immediate custodial arrest. This subsection does not preclude an arrest under . . . MCL 764.15 and 764.15a, or a proceeding under . . . MCL 712A.14."

When enforcing a foreign PPO, the officer must maintain the peace and take any appropriate action for violation of criminal law. MCL 600.2950*l*(8) provides that "[t]he penalties provided for under [MCL 600.2950] and [MCL 600.2950a] and . . . MCL 712A.1 to 712A.32, may be imposed in addition to a penalty that may be imposed for any criminal offense arising from the same conduct."

Once one of the foregoing conditions is met, MCL 764.15b and the PPO statutes authorize police to arrest without a warrant upon reasonable cause to believe that the respondent is violating or has violated the order, *if* the respondent has been given notice of the PPO. This notice can be given to the respondent in one of the following ways:

- Formal service, as described in Section 6.5(H);
- Service of a true copy of the order or oral advice about the order by a law enforcement officer or court clerk with knowledge of its existence at any time, as described in MCL 600.2950(18) and MCL 600.2950a(15);* or
- Service of a true copy of the order or oral notice from a law enforcement officer responding to a call alleging a violation of the PPO, as described in MCL 600.2950(22) and MCL 600.2950a(19).

*See Section 6.5(H) for more information about this form of service.

If notice cannot be verified on LEIN of NCIC for a foreign PPO, then a law enforcement officer may rely upon a statement from the petitioner indicating that the respondent has received notice of the order. MCL 600.2950*l*.

For domestic or non-domestic stalking PPOs, oral notice given by court clerks or law enforcement officers under the foregoing provisions must inform the respondent of:

- The PPO's existence;
- The specific conduct enjoined;
- The penalties for violating the PPO; and

- The place where the respondent may obtain a copy of the PPO.

If a law enforcement officer provides oral notice of a foreign PPO under the foregoing provisions, the law enforcement officer must inform the respondent of:

- The existence of the foreign PPO;
- The name of the issuing court;
- The specific conduct enjoined;
- The penalties for violating the order in this state; and
- The penalties for violating the order in the issuing jurisdiction, if the officer is aware of such penalities. MCL 600.2950*l*(9).

A proof of service or oral notice must be filed with the clerk of the court that issued the PPO. MCL 600.2950(18), (22), MCL 600.2950a(15), (19), and MCL 600.2950*l*(9). See also MCR 3.706(E). In situations where a law enforcement officer gives notice while responding to a call alleging a PPO violation, the officer must also immediately enter or cause to be entered into the LEIN network that the respondent has actual notice of the PPO. MCL 600.2950(22), MCL 600.2950a(19), and MCL 600.2950*l*(9).

> **Note:** If a law enforcement officer has made oral notice of a foreign protection order, the officer must provide the issuing court with a proof of service or proof of oral notice "if the address of the issuing court is apparent on the face of the foreign protection order or otherwise is readily available to the officer." MCL 600.2950*l*(9).

## B. Making a Warrantless Arrest Where the Notice Requirements Are Fulfilled

Once a respondent has received either service or oral notice of a PPO, MCL 764.15b(1) authorizes a police officer to make a warrantless arrest if the officer has — or receives positive information that another officer has — reasonable cause to believe that *all* of the following conditions exist:

- A PPO has been issued under the non-domestic stalking or domestic relationship PPO statutes, or is a foreign PPO;*
- The individual named in the PPO is violating or has violated the order. An individual is in violation of the order if he or she commits one or more of the acts *specifically prohibited* in the order; and
- If the PPO was issued under non-domestic stalking or domestic relations PPO statutes, the PPO must state on its face that a violation of its terms subjects the individual to immediate arrest and to either of the following:
  - If the individual is 17 years of age or older, to criminal contempt sanctions of imprisonment for not more than 93 days and to a fine of not more than $500.00; or

*A "foreign PPO" must either appear valid or be verified as described above. See Section 8.5(A).

*See Section 8.11 on enforcement proceedings for respondents under age 18.

– If the individual is less than 17 years of age, to the dispositional alternatives of the Juvenile Code, MCL 712A.18.*

If the respondent first received notice of the PPO from police officers responding to a call alleging a violation of the PPO, the officers must give the respondent an opportunity to comply with the PPO before making an arrest. The failure to immediately comply with the PPO is grounds for an immediate custodial arrest. MCL 600.2950(22) and MCL 600.2950a(19).

In *People v Freeman,* 240 Mich App 235 (2000), the Court of Appeals held that a police officer's reliance on LEIN information provided reasonable cause to believe that a respondent named in a PPO had notice of the PPO and had violated its provision, thereby supporting an immediate arrest. The Court noted that "reasonable cause" means "having enough information to lead an ordinarily careful person to believe that the defendant committed a crime. CJI2d 13.5(4)." 240 Mich App at 236.

MCL 764.9c(3)(b) prohibits issuance of an appearance ticket for persons subject to detainment for violation of a PPO.

Regardless of whether they make an arrest, police officers must write an incident report whenever they investigate or intervene in a domestic violence incident. The peace officer must use a standard domestic violence incident report form. MCL 764.15c(2) states that the report must contain, but not be limited to, all of the following information:

> "(a) The address, date, and time of the incident being investigated.
>
> "(b) The victim's name, address, home and work telephone numbers, race, sex, and date of birth.
>
> "(c) The suspect's name, address, home and work telephone numbers, race, sex, date of birth, and information describing the suspect and whether an injunction or restraining order covering the suspect exists.
>
> "(d) The name, address, home and work telephone numbers, race, sex, and date of birth of any witness, including a child of the victim or suspect, and the relationship of the witness to the suspect or victim.
>
> "(e) The following information about the incident being investigated:
>
> > (*i*) The name of the person who called the law enforcement agency.
> >
> > (*ii*) The relationship of the victim and suspect.
> >
> > (*iii*) Whether alcohol or controlled substance use was involved in the incident, and by whom it was used.

(*iv*) A brief narrative describing the incident and the circumstances that led to it.

(*v*) Whether and how many times the suspect physically assaulted the victim and a description of any weapon or object used.

(*vi*) A description of all injuries sustained by the victim and an explanation of how the injuries were sustained.

(*vii*) If the victim sought medical attention, information concerning where and how the victim was transported, whether the victim was admitted to a hospital or clinic for treatment, and the name and telephone number of the attending physician.

(*viii*) A description of any property damage reported by the victim or evident at the scene.

"(f) A description of any previous domestic violence incidents between the victim and the suspect.

"(g) The date and time of the report and the name, badge number, and signature of the peace officer completing the report."

Furthermore, the officers must provide the victim in the domestic dispute with information about how to obtain this incident report. MCL 764.15c(1).* A "domestic violence incident" includes a violation of a domestic relationship PPO issued under MCL 600.2950. MCL 764.15c(4)(a).

*Additional information must be provided to the victim. For further information see Section 4.2.

MCL 28.243(1) requires law enforcement to fingerprint those arrested for criminal contempt of court for an alleged violation of a non-domestic stalking PPO, a domestic relationship PPO, or a valid foreign PPO.

**Note:** The warrantless arrest procedures for PPO violations under MCL 764.15b do not preclude officers from making a warrantless arrest on other grounds, e.g., under MCL 764.15 (general authority to arrest) or MCL 764.15a (arrest for domestic assault). See Section 3.4 on the authority to arrest for domestic assault, and for discussion of the reasonable cause standard in the context of MCL 764.15a.

## 8.6 Pretrial Proceedings After Warrantless Arrest

This section outlines the pretrial procedural requirements that apply after an individual age 18 or older has been arrested without a warrant for an alleged PPO violation.* The discussion applies to domestic relationship, non-domestic stalking, and valid foreign PPOs.

*See Section 8.11 on enforcement of a PPO with a minor respondent.

## A. Jurisdiction to Conduct Contempt Proceedings

*For information on "valid foreign PPOs," see Section 8.13(A).

The family division of circuit court in each county in Michigan has jurisdiction to conduct contempt proceedings for an alleged violation of a PPO issued by the circuit court of any other county in Michigan or a valid foreign* PPO. MCL 764.15b(5). The arraignment must take place in the county where the arrest was made, however:

> "If the respondent is arrested for violation of a personal protection order as provided in MCL 764.15b(1), *the court in the county where the arrest is made shall proceed* as provided in MCL 764.15b(2)-(5), except as provided in this rule." MCR 3.708(C)(1). [Emphasis added.]

If the respondent is arrested in a county other than the one in which the PPO was issued, the hearing on the charged PPO violation may take place in either the arraigning or the issuing court. The arraigning court shall notify the issuing court prior to the hearing on the charges, and the issuing court may request that the respondent be returned to its county. If the issuing court requests the respondent's return, its county shall bear the cost of transporting the respondent. If the issuing court does not request the respondent's return, the arraigning court must proceed to a hearing on the charges. MCL 764.15b(5) and MCR 3.708(C)(1). Where the contempt proceeding is brought in a court other than the issuing court, MCR 3.708(C)(2) further provides:

> "A contempt proceeding brought in a court other than the one that issued the personal protection order shall be entitled 'In the Matter of Contempt of [Respondent].' The clerk shall provide a copy of the contempt proceeding to the court that issued the personal protection order."

The broad jurisdictional provisions of MCL 764.15b(5) and MCR 3.708(C)(1)-(2) protect victims who have fled from their places of residence to escape violence.

## B. Time and Place for Arraignment

An individual arrested without a warrant for the alleged violation of a PPO must be arraigned in family division of circuit court. The arraignment must take place in the county where the arrest occurred, regardless of where the PPO was issued. MCR 3.708(C)(1). The individual must be brought before the circuit court for arraignment within 24 hours after arrest. MCL 764.15b(2). If a circuit judge is not available within 24 hours after arrest, the individual must be brought within that time before the district court, which "shall set bond and order the respondent to appear for arraignment before the family division of the circuit court in that county." MCR 3.708(C)(3). See also MCL 764.15b(3).

**Note:** After-hours arrests are common in domestic violence cases. One study of 435 battered women reported that Saturdays and Sundays were the days of the week on which battering incidents (particularly serious ones) were most likely to occur. The study further reported that the most likely time of day for abusive incidents to occur was from 6 p.m. to 12 midnight.* To promote safety, and to avoid the potential constitutional conflicts that arise from holding persons who are arrested after court business hours, the Advisory Committee for this chapter of the benchbook suggests that courts clearly communicate with law enforcement and jail officials about procedures following after-hours arrests. The Committee also suggests that circuit courts include arraignments under MCL 764.15b in their plans for judicial availability adopted pursuant to MCR 6.104(G). On Fourth Amendment concerns with post-arrest detention, see Section 4.3.

*Walker, The Battered Woman Syndrome, p 25 (Springer, 1984). See also Greenfeld, et al, *Violence by Intimates*, p 11 (Bureau of Justice Statistics, 1998).

MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section."

### 1. Post-Arrest Proceedings Initiated in District Court

If an individual's first post-arrest court appearance is before the district court, the authority of the magistrate or district judge is limited to ordering the respondent to appear for arraignment in family division of circuit court in that county and setting bond. MCR 3.708(C)(3). See also MCL 764.15b(3). The rules for setting bond are discussed in Section 8.6(C).

The warrantless arrest statute and PPO court rules are silent as to the time for the district court to schedule the arraignment. The Advisory Committee for this chapter of the benchbook suggests that the district court schedule the arraignment in circuit court for the earliest possible time — the delay should not be beyond that reasonably necessary to obtain the arraignment, particularly if the respondent is in custody. The Committee's suggestion is based on the following authorities:

- MCL 764.15b(2)(a), which requires that the family division of circuit court set a hearing on the alleged PPO violation within 72 hours after arrest, unless extended by the court on the motion of the arrested individual or the prosecutor. See also MCR 3.708(F)(1)(a) for a similar provision.
- MCR 6.104(A), which applies to criminal cases cognizable in circuit court and provides: "Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment."
- *Brennan v Northville Twp,* 78 F3d 1152 (CA 6, 1996), and *Williams v Van Buren Twp,* 925 F Supp 1231 (ED Mich, 1996), describing the circumstances under which post-arrest detention under MCL 780.582a and MCL 780.581(3) will violate the arrestee's Fourth

Amendment rights. These cases, which are discussed in more detail at Section 4.3, state that the Fourth Amendment requires a prompt determination of probable cause to arrest whenever a suspect is arrested without a warrant. While a judicial probable cause determination within 48 hours of arrest will generally comply with the promptness requirement, a detention for less than 48 hours may still run afoul of the constitution if the arrestee can show that the probable cause determination was delayed unreasonably.

### 2. Post-Arrest Proceedings Initiated in Circuit Court

*See Section 8.6(C) on setting bond.

If an individual's first post-arrest court appearance is before the circuit court, that court must set a reasonable bond pending a hearing on the alleged violation, unless the court determines that release will not reasonably ensure the safety of the individuals named in the PPO.* MCL 764.15b(2)(b), MCR 3.708(D)(5), and MCR 3.708(F)(1)(a). Additionally, the circuit court must:

- Advise the respondent of the alleged violation. MCR 3.708(D)(1). The notice of violation should advise the respondent of the possible penalties for criminal and/or civil contempt. See *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), requiring that a person charged with contempt be informed whether the proceedings against him or her involve civil or criminal sanctions.
- Advise the respondent of the right to contest the charge at a contempt hearing. MCR 3.708(D)(2).
- Advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one. MCR 3.708(D)(3).
- If requested and appropriate, appoint a lawyer. MCR 3.708(D)(4).
- Schedule a hearing on the charges or take a guilty plea. MCR 3.708(D)(6).

If the circuit court schedules a hearing on the charged violation, it must make the following notifications:

- Notify the prosecuting attorney of the proceedings. MCR 3.708(F)(2) and MCL 764.15b(2)(c).
- Notify the petitioner and his or her attorney, if any. The court must also direct the party to appear at the hearing and give evidence on the charge of contempt. MCR 3.708(F)(3) and MCL 764.15b(2)(d).

The prosecuting attorney must prosecute the criminal contempt proceedings, unless:

- The petitioner retains his or her own attorney for this purpose. MCR 3.708(G) and MCL 764.15b(7);
- The prosecutor determines that the PPO was not violated. MCL 764.15b(7); or

- The prosecutor decides that it would not be in the interests of justice to prosecute the criminal contempt violation. *Id*.

If the prosecuting attorney prosecutes the criminal contempt proceeding, the court may dismiss it upon the prosecuting attorney's motion for good cause shown. MCL 764.15b(7).

> **Note:** Prosecutors may move for dismissal of contempt proceedings on various substantive and procedural grounds. Actions constituting a PPO violation may also constitute criminal offenses. Michigan law specifically permits concurrent criminal and PPO enforcement proceedings, and both may be necessary to provide safety for the petitioner. See MCL 600.2950(23) and MCL 600.2950a(20). However, the concurrence of proceedings raises double jeopardy and other procedural questions that may influence a prosecutor's exercise of discretion in handling alleged PPO violations. A hearing on an alleged PPO violation may be postponed pending the outcome of criminal proceedings if the alleged violation is the basis for a separate criminal prosecution. See MCR 3.708(F)(1)(c), discussed at Section 8.6(D). On double jeopardy, see Section 8.12.

## C. Setting Bond in Circuit or District Court

If the police arrest an individual for an alleged PPO violation, no bond is allowed until a court reviews the case and sets bond. Bond must be set within 24 hours after arrest. MCL 764.15b(2)(b). The family division of circuit court is responsible for setting bond unless no circuit judge is available within 24 hours after arrest; in that case, the district court shall set bond. MCL 764.15b(3) and MCR 3.708(C)(3).

> **Note:** MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section."

Safety is of primary concern in setting bond in cases involving allegations of domestic violence. MCR 3.708(F)(1)(a) provides that "[t]he court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the individuals named in the personal protection order." If the court decides to release the respondent on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) that is necessary to reasonably ensure the safety of the individuals named in the PPO, including continued compliance with the PPO. The release order shall also comply with MCL 765.6b. MCR 3.708(F)(1)(b). This statute provides for LEIN entry of release orders issued for the protection of a named individual, and for warrantless arrest upon reasonable cause to believe that an individual has violated such an order. SCAO Form MC 240* is designed for orders issued under MCL 765.6b.

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms/index.htm (last visited March 9, 2004).

For more discussion of conditional release orders under MCL 765.6b, see Sections 4.4 - 4.9.

> **Note:** Although a conditional release order issued by a district court will continue in effect after the case is transferred to circuit court, the Advisory Committee for this chapter of the benchbook suggests that circuit courts take steps to update the information in the LEIN system after the transfer occurs. Updating the LEIN information can facilitate enforcement by clarifying the status of the case for law enforcement officers who use the system. To update the LEIN information, the circuit court can continue or modify the district court's release order at arraignment and make it an order of the circuit court. This can be done by completing SCAO Form MC 240 or MC 240a, and contacting the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered into LEIN, Form MC 239 can be used to remove the district court's order from the system. See Section 4.8 for further discussion.

## D. Time for Holding a Hearing on the Charged Violation

The time for holding the hearing on an alleged PPO violation is governed by MCR 3.708(F)(1)(a), which provides:

> "Following the respondent's appearance [*at a show cause proceeding*] or arraignment [*after warrantless arrest*], the court shall do the following:*
>
> > "(1) Set a date for the hearing at the earliest practicable time except as required under MCL 764.15b.
> >
> > > (a) The hearing of a respondent being held in custody for an alleged violation of a personal protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. . . ."

*The bracketed text has been added by the Advisory Committee and is its interpretation of the court rule. Show cause proceedings are discussed in Section 8.7.

See also MCL 764.15b(2)(a) for a similar provision.

The Advisory Committee for this chapter of the benchbook believes that the "earliest practicable time" provision in MCR 3.708(F)(1) refers only to show cause proceedings. If the contempt proceeding has been initiated after warrantless arrest, the Committee believes that the court rule incorporates the provisions of MCL 764.15b(2)(a) governing the time for holding a hearing on the alleged violation. This statute requires the circuit court to "[s]et a time certain for a hearing on the alleged violation of the [PPO]. The hearing shall be held within 72 hours after arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney."

The 72-hour period for holding the violation hearing may be extended in three ways:*

*There are no provisions for adjournment or postponement upon motion by an attorney retained by the petitioner.

- On motion by the arrested individual or the prosecutor, under MCL 764.15b(2)(a).
- On motion by the prosecutor, under MCR 3.708(F)(1)(c), which provides: "If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution . . . the court may postpone the hearing for the outcome of that prosecution."
- On motion by the prosecutor who is prosecuting the contempt proceeding, under MCL 764.15b(7), which permits adjournments for "not less than 14 days or a lesser period requested."

  **Note:** On double jeopardy concerns that may influence a prosecutor's exercise of discretion in handling alleged PPO violations, see Section 8.12.

MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section." This provision took effect July 1, 2000, and appears to supersede the Court of Appeals' ruling in *In re Contempt of Tanksley*, 243 Mich App 123 (2000), which considered the effect of a violation of the 72-hour hearing requirement under a previous version of the statute. The Court in that case determined that charges of criminal contempt for violation of a PPO should be dismissed without prejudice where the 72-hour time requirement was violated.

## E. Taking a Guilty Plea at Arraignment — Guilty Plea Script

If the respondent offers a guilty plea at arraignment, the circuit court may accept it only if the following requirements of MCR 3.708(E) are met:

> "...Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must
>
> > "(1) advise the respondent that by pleading guilty the respondent is giving up the right to a contested hearing and, if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in [MCR 3.708(D)(3)].
> >
> > "(2) advise the respondent of the maximum possible jail sentence for the violation,
> >
> > "(3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and
> >
> > "(4) establish factual support for a finding that the respondent is guilty of the alleged violation."

The following guilty plea script is based on MCR 3.708(E)(1)-(4), and was prepared by Hon. William J. Caprathe, 18th Circuit Court:

1) What is your name?

2) How old are you?

3) Can you read, write and understand the English language?

4) Can you hear and understand me?

5) Do you understand that you are pleading guilty to violating a PPO?

6) Do you understand that you are giving up a right to a hearing and if not represented, you are giving up your right to lawyer, to either hire one or if you can't afford one to have the court appoint one for you?

7) Do you understand that throughout the hearing, you are presumed innocent until your guilt is proven beyond a reasonable doubt?

8) Do you understand that you have the right to have all witnesses against you appear at the hearing, to ask the witnesses questions, and to have a judge order any witnesses you might have to appear at the hearing?

9) Do you understand that you don't have to testify at the hearing and nobody can say anything about you not testifying or hold it against you? On the other hand, you have the right to testify at the hearing if you want to testify.

10) Do you understand that if the judge accepts your guilty plea, you will not have a contested hearing, and you will be giving up all the rights I have told you about, you will also be giving up any claim that the plea was not your own choice but the result of promises and threats that were not disclosed to the court?

11) Do you understand that any appeal from the conviction and sentence following the guilty plea will be by application for leave to appeal and not by right?

12) Do you understand that if you are on probation or parole, this plea could affect your probation or parole status?

13) Has anyone threatened you?

14) Is it your own choice to plead guilty?

15) How do you plead to violating the PPO? Tell me what happened, when, and where.

The court must state on the record that it finds that the plea was understandingly, voluntarily, and knowingly made.

## 8.7 Pretrial Procedures Where There Has Been No Arrest for an Alleged PPO Violation

Where there has been no arrest following an alleged PPO violation, the petitioner may seek enforcement by way of a show cause proceeding in family division of circuit court. Where the petitioner initiates the contempt proceedings, the respondent may be sanctioned for either civil or criminal contempt. This section addresses the petitioner's motion to show cause and the respondent's first appearance in court in response to the petitioner's motion. The discussion assumes that the respondent is age 18 or older.*

*See Section 8.11 on enforcement of PPOs with a minor respondent.

### A. Place for Filing a Motion for an Order to Show Cause

The PPO statutes and court rules do not specify where a petitioner should initiate show cause proceedings in cases where there has been no arrest for an alleged violation of a PPO. The broad jurisdictional provisions of MCL 764.15b(5), discussed at Section 8.6(A), are limited to situations where there has been a warrantless arrest for the alleged PPO violation.

Because violation of a PPO is an offense against the issuing court, the Advisory Committee for this chapter of the benchbook suggests that as a general rule, show cause proceedings should be initiated in the issuing court. See *Cross Co v UAW Local No 155*, 377 Mich 202, 212 (1966). If, however, there are exigent circumstances that justify bringing the show cause proceeding elsewhere (e.g., the petitioner would be endangered by seeking enforcement in the issuing court), the Committee suggests that the court in the jurisdiction where the alleged violation occurred could entertain the show cause proceeding after consultation with the issuing court. See *Cross Co v UAW Local No 155, supra*, which approved transfer of contempt proceedings in the "sound discretion of the judge handling the original proceeding." Besides safety, other factors the court might consider in exercising the discretion to transfer a contempt proceeding might include whether the issuing judge can fairly preside over the matter, whether the proceedings would be unduly delayed by transfer, or whether a judge is readily available in the issuing court.

Where a contempt proceeding is initiated in a court other than the issuing court after warrantless arrest of the respondent, MCR 3.708(C)(2) provides:

> "A contempt proceeding brought in a court other than the one that issued the personal protection order shall be entitled 'In the Matter of Contempt of [Respondent].' The clerk shall provide a copy of the contempt proceeding to the court that issued the personal protection order."

There is no corresponding provision in MCR 3.708(B), the court rule governing motions to show cause.

## B. Filing of Motion and Sufficiency of Affidavit

MCR 3.708(B)(1) governs the filing of a motion to show cause:

> "If the respondent violates the personal protection order, the petitioner may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. . . . "

There is no fee for filing a motion to show cause. *Id*.

In *Michigan v Powers*, 97 Mich App 166, 168 (1980), the Court of Appeals made the following comments about the sufficiency of the supporting affidavit.

> "Contumacious behavior not committed in the presence of the court, to be subject to punishment for contempt, must be brought to the court's attention by petition supported by affidavit(s) of a person or persons who witnessed or have personal knowledge of the acts charged. If an inadequate affidavit is the predicate which underlies the contempt proceeding or if no affidavit at all accompanies the petition, the court lacks jurisdiction over the person of the alleged contemnor. . . . In determining whether an affidavit is sufficient, *i.e*., whether it states facts which constitute the commission of contemptuous conduct, a trial judge can rely on the stated facts as well as legitimate inferences drawn therefrom."

If the petitioner's motion and affidavit establish a basis for a finding of contempt, MCR 3.708(B)(1) provides that the court shall either:

> "(a) order the respondent to appear at a specified time to answer the contempt charge; or
>
> "(b) issue a bench warrant for the arrest of the respondent."

## C. Service of a Motion and Order to Show Cause

Service of a motion and order to show cause must be made by personal service to the respondent at least seven days before the show cause hearing. MCR 3.708(B)(2).

## D. Proceedings at Respondent's First Appearance; Setting the Matter for Hearing

MCR 3.708(D) governs proceedings at the respondent's first appearance before the court in a show cause proceeding. The court must:

- Advise the respondent of the alleged violation. MCR 3.708(D)(1). This advice should inform the respondent of the possible penalties for

criminal and/or civil contempt. See *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), holding that a person charged with contempt has a due process right to be informed at the outset whether the proceedings involve criminal or civil contempt.

- Advise the respondent of the right to contest the charge at a contempt hearing. MCR 3.708(D)(2).
- Advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one. MCR 3.708(D)(3).
- If requested and appropriate, appoint a lawyer. MCR 3.708(D)(4).
- Set a reasonable bond pending a hearing on the alleged violation, unless the court determines that release will not reasonably ensure the safety of the individuals named in the PPO. MCR 3.708(D)(5) and MCR 3.708(F)(1)(a). If the court decides to release the respondent on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) that is necessary to reasonably ensure the safety of the individuals named in the PPO, including continued compliance with the PPO. The release order shall also comply with MCL 765.6b. MCR 3.708(F)(1)(b). This statute provides for LEIN entry of release orders issued for the protection of a named individual, and for warrantless arrest upon reasonable cause to believe that an individual has violated such an order. SCAO Form MC 240* is designed for orders issued under MCL 765.6b. For more discussion of conditional release orders under MCL 765.6b, see Sections 4.4 - 4.9.
- Schedule a hearing on the charges or take a guilty plea. MCR 3.708(D)(6). If the court schedules a hearing on the alleged violation it must be held at the "earliest practicable time" after the respondent's first appearance in the show cause proceeding. MCR 3.708(F)(1). If the respondent offers a guilty plea, the circuit court may accept it only if it comports with MCR 3.708(E). The requirements of MCR 3.708(E) and a guilty plea script appear at Section 8.6(E).

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms/index.htm (last visited March 9, 2004).

In addition to the foregoing requirements, the court must also notify the prosecuting attorney of the proceedings if the respondent is subject to criminal contempt sanctions. MCL 764.15b(4)(b) and MCR 3.708(F)(2). In both civil and criminal contempt proceedings, the court must notify the petitioner and his or her attorney and direct the party to appear at the hearing and give evidence on the charge of contempt. MCL 764.15b(4)(a) and MCR 3.708(F)(3).

MCL 764.15b(7) requires the prosecutor to prosecute a criminal contempt proceeding initiated by a motion to show cause, unless:

- The petitioner retains his or her own attorney for this purpose;
- The prosecutor determines that the PPO was not violated; or
- The prosecutor decides that it would not be in the interests of justice to prosecute the criminal contempt violation.

If the prosecuting attorney prosecutes the criminal contempt proceeding, the court may dismiss it upon the prosecuting attorney's motion for good cause shown. *Id*.

The time for holding the hearing on an alleged PPO violation is governed by MCR 3.708(F)(1)(a), which provides:

> "Following the respondent's appearance [*at a show cause proceeding*] or arraignment [*after warrantless arrest*], the court shall do the following:*
>
> > "(1) Set a date for the hearing at the earliest practicable time except as required under MCL 764.15b [the statute governing proceedings after warrantless arrest].
> >
> > > (a) The hearing of a respondent being held in custody for an alleged violation of a personal protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. . . ."

*The bracketed text has been added by the Advisory Committee and is its interpretation of the court rule. Proceedings after warrantless arrest are discussed in Section 8.6.

The 72-hour period for holding the violation hearing for a respondent held in custody may be extended as follows:

- On motion by the prosecutor who is prosecuting the contempt proceeding, under MCL 764.15b(7), which permits adjournments for "not less than 14 days or a lesser period requested."*
- On motion by the prosecutor, under MCR 3.708(F)(1)(c), which provides: "If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution . . . the court may postpone the hearing for the outcome of that prosecution."

  **Note:** On double jeopardy concerns that may influence a prosecutor's exercise of discretion in handling alleged PPO violations, see Section 8.12.

*There is no provision for adjournment or postponement upon motion by an attorney retained by the petitioner.

## 8.8 Hearing on the Contempt Charges

This section describes the procedures for hearings on alleged PPO violations as set forth in MCR 3.708(H). This rule applies in cases where the respondent is age 18 or older.* Except where specified, this rule applies to both civil and criminal contempt proceedings. For discussion of due process requirements in contempt proceedings generally, see Section 8.4.

*For procedures involving a minor respondent, see Section 8.11.

- "There is no right to a jury trial." MCR 3.708(H)(1).
- "The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses." MCR 3.708(H)(2).
- "The rules of evidence apply to both criminal and civil contempt proceedings." MCR 3.708(H)(3).

- "At the conclusion of the hearing, the court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." MCR 3.708(H)(4).

Regarding the burden of proof, MCR 3.708(H)(3) provides:

> "The petitioner or the prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence."

## 8.9 Sentencing for Contempt

Because domestic violence can have lethal consequences, safety is of primary concern in imposing sentence upon conviction of a PPO violation. There are many danger signals to look for in making a safety assessment — a list of "lethality factors" appears at Section 1.4(B). One important safety consideration is that domestic violence may escalate when the abused individual seeks outside intervention or attempts to leave the relationship. Such "separation violence" occurs when an abuser perceives a loss of control over an intimate partner and intensifies the violence in order to regain it. Caution is also warranted with individuals who violate a PPO soon and/or often after its issuance. In these cases, the offender's willingness to resort to violence without regard for the court's authority indicates the need for swift, stern action to ensure the petitioner's safety. Criminal intervention and safety planning for the petitioner may also be needed in these cases to supplement the protection offered by a PPO.*

**Civil Protection Orders: The Benefits & Limitations for Victims of Domestic Violence,* p 56-58 (Nat'l Center for State Courts, 1997).

Where an individual age 17 or older has been convicted of a PPO violation, the court can make use of one or more of the following sentencing options, which are the subject of this section:*

- Criminal contempt sanctions, which involve a mandatory jail term for a fixed period and a fine in the court's discretion;
- Coercive sanctions for civil contempt, which involve an indeterminate jail term and/or fine in the court's discretion;
- Compensation to injured parties for losses resulting from the violation of the court's order; and
- Modification of the PPO.

*See Section 8.11(I) on dispositional alternatives for respondents under 17. Note that while adult *penalties* are imposed on persons 17 or older, adult *procedures* are not appropriate until a respondent is age 18. See 8.11(A) and (I).

### A. Sentencing for Criminal Contempt

The PPO statutes provide the following criminal contempt penalties for violation of a personal protection order:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, *shall* be imprisoned for not more than 93 days and *may* be fined not more than $500.00 . . . . The criminal penalty provided for under this section may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct." MCL 600.2950(23) and MCL 600.2950a(20). [Emphasis added.] See also MCR 3.708(H)(5)(a) for a similar provision.

Michigan's appellate courts have not yet addressed whether the foregoing statutes require mandatory imprisonment upon conviction of a PPO violation. The Advisory Committee for this chapter of the benchbook believes that under the plain meaning of the words "shall" and "may" in these statutes, imprisonment is mandatory, and a fine is discretionary.

A second unresolved question is whether probationary sentences are authorized upon conviction of criminal contempt under the PPO statutes. To answer this question, a court must determine whether: 1) the probation statutes apply to criminal contempt convictions; and 2) the mandatory nature of the jail sentence imposed in the PPO statutes forecloses the imposition of a probationary sentence. For the reasons that follow, the Advisory Committee for this chapter of the benchbook suggests that Michigan courts retain discretion to impose probationary sentences upon conviction of a PPO. However, the Committee further suggests that probation should *not* be routinely used as a sentencing option for PPO offenders.

### 1. Applicability of Probation Statutes to Criminal Contempt Convictions

The Michigan appellate courts have not yet addressed the question whether the probation statutes in the Code of Criminal Procedure — which refer to cases involving "misdemeanors" — apply to criminal contempt convictions. The probation statute in the Code of Criminal Procedure provides as follows:

> "In all prosecutions for felonies or *misdemeanors* other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses . . . if the defendant has been found guilty upon verdict or plea, and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer." MCL 771.1(1). [Emphasis added.]

See also MCL 771.14(1), which gives courts discretion to order preparation of a presentence investigation report in a case involving "misdemeanor" charges.

The Code of Criminal Procedure defines "misdemeanor" as follows:

> "'Misdemeanor' means a *violation of a penal law* of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h). [Emphasis added.]

In deciding whether a criminal contempt conviction involves a "violation of a penal law," it is significant to note that under the foregoing definition, "misdemeanors" are not restricted to offenses set forth within the Michigan Penal Code. Indeed, the Legislature has created many criminal offenses outside the Penal Code that are nonetheless considered "penal laws" for purposes of the procedures set forth the Code of Criminal Procedure. The most notable of these are the controlled substance offenses found within the Health Code and traffic offenses found within the Michigan Vehicle Code. Thus, the term "misdemeanor" cannot be defined according to the place where the offense is located within the Michigan Compiled Laws. Instead, a "misdemeanor" must be defined according to the nature of the offense.

The nature of a misdemeanor offense is described as follows in the Michigan Penal Code:

> "When any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor." MCL 750.8.

The Michigan Supreme Court articulated a similar definition of "crime" in *People v Goldman*, 221 Mich 646 (1923). The defendant in this case challenged his sentence to probation for violating a city ordinance, asserting that ordinance violations were not "crimes" for which probation could be imposed. The ordinance violation carried a penalty of up to 90 days in jail and/or a maximum $500.00 fine. The Supreme Court upheld the probationary sentence, characterizing the offense as a "crime" according to the following definition:

> "Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime." 221 Mich at 649.

The Advisory Committee for this chapter of the benchbook suggests that the foregoing Penal Code and Supreme Court definitions of "misdemeanor" and "crime" construe these terms broadly enough to encompass a criminal contempt conviction for violation of a PPO. The statutory penalties for a PPO violation include a jail term and fine, both of which are characteristic of criminal misdemeanor offenses. The Michigan Legislature has also recognized the criminal nature of the sanctions in the PPO statutes in MCL 600.2950(23) and MCL 600.2950a(20), which state: "The *criminal* penalty provided for under this section may be imposed in addition to a penalty that may be imposed for *another* criminal offense arising from the same conduct." [Emphasis added.]*

*See also *U.S. v Dixon,* 509 US 688, 696 (1993), which characterizes criminal contempt as a "crime in the ordinary sense."

## 2. Effect of Mandatory Sentencing Provisions

If a criminal contempt conviction is a "misdemeanor" to which the probation statutes apply, a probationary sentence will be appropriate for a PPO violation unless the mandatory nature of the statutory penalty forecloses this sentencing option. The Michigan appellate courts have not yet addressed this question. The Advisory Committee for this chapter of the benchbook suggests that the mandatory jail term in the PPO statutes may not be inconsistent with a probationary sentence because MCL 771.3(2)(a) permits the court to impose jail as a condition of probation. This statute provides that the court may, as a condition of probation, require the defendant to "[b]e imprisoned in the county jail for not more than 12 months . . . [or up to] the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months." Thus, a court may impose a probationary sentence on a PPO offender, as long as jail time is one of the conditions of probation.

> **Note:** The jail term imposed upon conviction of criminal contempt under the PPO statutes must be for a definite period of time. Indeterminate sentences are inappropriate. *In re Contempt of Dougherty,* 429 Mich 81, 93-94 (1987).

## 3. Difficulties With Probationary Sentences for PPO Offenders

Although the Advisory Committee for this chapter of the benchbook believes that arguments could be made for imposing probationary sentences for PPO violations, it nonetheless suggests that courts use probation only in exceptional cases. The Committee discourages the routine imposition of probation for PPO violations due to certain serious practical difficulties that arise with this type of sentence:

- Probation is not a safe sentencing option for offenders who display disregard for court orders or higher levels of violence. By violating a PPO, the offender has already shown disregard for a court's order, so that a jail sentence may be the only way to ensure that the offender no longer has access to the petitioner.
- A jail sentence may be the most effective way of holding the offender accountable for his or her behavior. Most professionals who work with

batterers agree that batterers will not change their behavior unless they are held accountable for it. A jail sentence is a highly effective way for society to express its condemnation of violent behavior.

- Many courts do not have the resources to adequately supervise persons who are sentenced to probation. Unsupervised probation may increase the danger in a situation by releasing the offender with the message that violent behavior will not be taken seriously.

For a discussion of participation in batterer intervention services as a condition of probation, see Section 4.14(C).

## B. Jail Term and Fine in Civil Contempt Cases

Individuals found guilty of civil contempt are subject to a fine or imprisonment in the court's discretion under the general penalty provisions for contempt in the Revised Judicature Act. MCR 3.708(H)(5)(b). The provisions applicable to civil contempt for violation of a PPO provide:

> "(1) [P]unishment for contempt may be a fine of not more than $250.00, or imprisonment . . . or both, in the discretion of the court.
>
> "(2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment and pays the fine, costs, and expenses of the proceedings which shall be specified in the order of commitment." MCL 600.1715.

It is often said that a person imprisoned for civil contempt "has the key to the jailhouse door," which the contemnor can unlock at any time by doing the act that the court has commanded. Where imprisonment for civil contempt is imposed to coerce the performance of a desired action, the sentence may be of indeterminate duration, ending when the contemnor either does the court-ordered action or loses the power to do so.

> **Note:** Because periods of probation may only be imposed for a definite term, probation is not properly ordered where a contemnor is imprisoned for an indefinite term for civil contempt. See MCL 771.2 and *Hill v Hill*, 322 Mich 98, 103 (1948).

## C. Compensation for Actual Losses

Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior.

> "If the alleged misconduct has caused an actual loss or injury to any person the court *shall* order the defendant to pay such person

> a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." MCL 600.1721. [Emphasis added.]

To obtain an order for compensation under MCL 600.1721, the complainant has the burden to prove that the respondent was guilty of contempt, and that the contemptuous conduct caused actual loss or injury. The complainant must also show the amount of the injury. *Montgomery v Muskegon Booming Co*, 104 Mich 411, 413 (1895), and *In re Contempt of Rochlin*, 186 Mich App 639, 651 (1990). Because compensation under MCL 600.1721 is awarded in lieu of a separate action to recover damages, some scholars have suggested that the standard of proof should be by preponderance of the evidence, as it is in a civil action.* But see MCR 3.708(H)(3) (burden of proof of guilt of civil contempt for PPO violation is by clear and convincing evidence).

*Stockmeyer, *Compensatory Contempt,* 74 Mich Bar Journal 296, 297 (1995).

> **Note:** Because MCL 600.1721 makes no distinction between civil and criminal contempt actions, the Advisory Committee for this chapter of the benchbook suggests that compensation to the injured party should be available in both types of proceedings. See *Birkenshaw v Detroit*, 110 Mich App 500, 510-511 (1981), in which the Court of Appeals upheld portions of a compensatory damages award imposed upon a party convicted of criminal contempt. However, MCR 3.708(H)(5)(a)–(b) provides different sanctions for civil and criminal contempt. MCR 3.708(H)(5)(a) applies to criminal contempt and states that the court must sentence the defendant to incarceration for no more than 93 days and may impose a fine of not more than $500.00. MCR 3.708(H)(5)(b) applies to civil contempt proceedings and states that the court shall impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721.

MCL 600.1721 allows recovery of damages sufficient to indemnify the injured party for actual losses caused by the respondent's misconduct. Punitive damages are not recoverable, but exemplary damages are appropriate if they are awarded to compensate the complainant for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, wilfully, and wantonly inflicted by the respondent. *Birkenshaw v Detroit, supra*. Examples of injuries that may be compensated in damages in a PPO context include:

- Medical expenses incurred as a result of the PPO violation.
- Property damage.
- Lost wages as a result of the violation.
- Child care expenses incurred as a result of the violation.
- Attorney fees incurred as a result of the other party's contemptuous conduct. *Homestead Development Co v Holly Twp*, 178 Mich App 239, 246 (1989).

## D. Reimbursement to Local Authorities

The court may order a person found guilty of criminal contempt for violating a PPO to reimburse the state or a local unit of government for expenses incurred in relation to the PPO violation.* MCL 769.1f(1)(i). PPO's include domestic relations PPOs issued pursuant to MCL 600.2950, non-domestic stalking PPOs issued pursuant to MCL 600.2950a, and foreign PPOs issued by other states, Indian Tribes, or U.S. territories that comply with the conditions for validity provided in MCL 600.2950i. *Id.*

*The foreign PPO must satisfy the conditions for validity provided in MCL 600.2950i. See Section 8.13(A) for more information.

Reimbursable expenses incurred in relation to a PPO violation include but are not limited to the expenses for an emergency response and for prosecution. MCL 769.1f(1). MCL 769.1f(2) states that the "expenses for which reimbursement may be ordered under this section include all of the following:

> "(a) The salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine.
>
> "(b) The salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose.
>
> "(c) The cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose.
>
> "(d) The salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction.
>
> "(e) The cost of extraditing a person from another state to this state including, but not limited to, all of the following:
>
> (*i*) Transportation costs.

> (*ii*) The salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state."

*The reimbursement may be ordered as a condition of probation or parole. See MCL 769.1f(5).

The reimbursement ordered by the court must be paid to the clerk of the court. MCL 769.1f(4). The clerk must transmit the appropriate amount to the unit or units of government named in the reimbursement order. *Id.* The reimbursement ordered shall be made immediately, unless the court provides for payment within a specified period or in specified installments.* *Id*.

### E. Amendments to the PPO

In addition to the foregoing sanctions, MCR 3.708(H)(5) provides that "the court may impose other conditions to the personal protection order" upon conviction of civil or criminal contempt. The Advisory Committee for this chapter of the benchbook suggests that the "other conditions" referenced in MCR 3.708(H)(5) be limited to those conditions that the court could have imposed upon issuance of the PPO. Those conditions are set forth at MCL 600.2950(1) and MCL 600.2950a(1), which are discussed at Sections 6.3(B) and 6.4(C).

### F. Court Clerk Reporting

MCL 769.16a(1) requires the clerk of the court to report the disposition of criminal contempt charges for violation of a PPO to the Michigan State Police. MCL 769.16a(5) provides that if fingerprints have not already been taken, the court must order that the fingerprints of the convicted person be taken and forwarded to the Michigan State Police. Additionally, MCL 28.242(1) requires the Michigan State Police to collect and file the conviction and fingerprints with criminal history information. See SCAO Memorandum 2002-01 for information on the forms for the required reports to the Michigan State Police.

## 8.10 Appeals From Conviction of Contempt

*See Section 8.11(J) on appeals in cases involving a minor respondent.

In cases involving respondents age 18 or older,* MCR 3.709 provides for an appeal of right from conviction of criminal contempt only:

> "(A) Except as provided by this rule, appeals involving [adult] personal protection order matters must comply with subchapter 7.200.
>
> . . .
>
> "(C) From Finding After Violation Hearing.
>
> (1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.

(2) All other appeals concerning violation proceedings are by application for leave."

## 8.11 Enforcement Proceedings Involving a Respondent Under Age 18

### A. Jurisdiction and Applicable Authorities

MCL 712A.2(h) gives the family division of circuit court jurisdiction over minor respondents in PPO proceedings under the domestic relationship and non-domestic stalking PPO statutes and a proceeding to enforce a valid* foreign protection order. If the court exercises its jurisdiction under this provision, jurisdiction continues until the order expires, even if the respondent reaches adulthood during that time. MCL 712A.2a(3). However, "action regarding the personal protection order after the respondent's eighteenth birthday shall not be subject to [the Juvenile Code]." *Id.* Instead, the court would apply adult PPO laws and procedures to actions regarding the PPO after the respondent's 18th birthday. MCR 3.708(A)(2).

*See Section 8.13(A) for information on "valid" foreign PPOs.

> **Note**: Although they are subject to the enforcement *procedures* for minor respondents, violations committed on or after the respondent's 17th birthday are subject to adult *penalties*. MCL 600.2950(11)(a)(*i*) and MCL 600.2950a(8)(a)(*i*). See Section 8.11(I)(1) for more information.

Proceedings to enforce a PPO against a respondent under age 18 are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A), 3.708(A)(2), and 3.982(B). The rules exclusively applicable to such proceedings are set forth at MCR 3.981–3.989. See MCR 3.901(B)(5). Procedures on appeals related to minor PPOs are governed by MCR 3.709 and 3.993.

### B. Referee May Preside at Enforcement Proceedings

The court may assign a nonattorney referee to preside at a preliminary hearing for enforcement of a minor PPO. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor PPO and make recommended findings and conclusions. MCR 3.913(A)(2)(d).

### C. Initiation of Proceedings — Overview

If a respondent allegedly violates a minor personal protection order, the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker may submit a written supplemental petition to have the respondent found in contempt. MCR 3.983(A). The supplemental petition must contain a specific description of the facts constituting the violation of the PPO. *Id*. There is no fee for the supplemental petition. *Id*.

## D. Original Petitioner Initiates Proceeding by Filing a Supplemental Petition

*See Section 8.7(A) on filing contempt proceedings outside the jurisdiction of the issuing court.

If the original petitioner files the supplemental petition in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).*

Upon receipt of the supplemental petition, MCR 3.983(B)(1)–(2) requires the court to either:

- Set a date for a preliminary hearing on the petition, to be held as soon as practicable, and issue a summons to appear; or
- Issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent.

### 1. Apprehension of the Respondent

MCL 712A.2c authorizes a court to issue an order for apprehension of a minor who allegedly violates a PPO, as follows:

*See Section 8.13(A) for information on "valid" foreign PPOs.

> "The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is . . . alleged to have violated a personal protection order issued under [MCL 712A.2(h)] or is alleged to have violated a valid* foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

If the court issues an order to apprehend the respondent, MCR 3.983(D)(1)(a)–(b) provides that the order may include authorization to:

- "[E]nter specified premises as required to bring the minor before the court;" and
- "[D]etain the minor pending preliminary hearing if it appears there is a substantial likelihood of retaliation or continued violation."

An officer must immediately take the actions specified in MCR 3.984(B)(1)–(4) when the officer apprehends a minor respondent under any of the following circumstances:

- pursuant to a court order that specifies that the minor is to be brought directly to court, or
- without a court order if the officer has not obtained a written promise from the minor's parent, guardian, or custodian to bring the minor to

court, or the officer believes that there is a substantial likelihood of retaliation or violation by the minor.

MCR 3.984(B)(1)–(4) requires the officer to immediately do the following:

- If the whereabouts of the respondent's parent or parents, guardian, or custodian is known, inform them of the respondent's apprehension and of his or her whereabouts, and of the need for them to be present at the preliminary hearing. MCR 3.984(B)(1).
- Take the respondent before the court for a preliminary hearing, or to a place designated by the court pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).
- Prepare a custody statement for submission to the court. The statement must include: a) the grounds for and the time and location of detention; and b) the names of persons notified and the times of notification, or the reason for failure to notify. MCR 3.984(B)(3).
- Ensure that a supplemental petition is prepared and filed with the court. MCR 3.984(B)(4).

The officer is also required to take fingerprints of a juvenile detained for violation of a PPO or foreign PPO. MCL 28.243(1).

While awaiting arrival of the parent or parents, guardian, or custodian, appearance before the court, or otherwise, a minor respondent under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner. MCR 3.984(C).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

**Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6), the issuing jurisdiction bears this expense.

### 2. Service of Supplemental Petition and Summons on Respondent

If the court sets a date for a preliminary hearing, the petitioner must serve the supplemental petition and the summons on the respondent and, if the relevant addresses are known or ascertainable upon diligent inquiry, on the

respondent's parent or parents, guardian, or custodian. Service must be made as provided in MCR 3.920 at least seven days before the preliminary hearing. MCR 3.983(C).

MCR 3.920(B)(2)(c) provides:

> "In a personal protection order enforcement proceeding involving a minor respondent, a summons must be served on the minor. A summons must also be served on the parent or parents, guardian, or legal custodian, unless their whereabouts remain unknown after a diligent inquiry."

MCR 3.920(B)(4) provides for the manner of service as follows:

> "(a) Except as provided in subrule (B)(4)(b), a summons required under subrule (B)(2) must be served by delivering the summons to the party personally.
>
> "(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.
>
> "(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

The summons must direct the person to whom it is addressed to appear at a time and place specified by the court. MCR 3.920(B)(3). The summons must also:

- Identify the nature of the hearing. MCR 3.920(B)(3)(a).
- Explain the right to an attorney and the right to trial by judge. MCR 3.920(B)(3)(b). (There is no right to a jury trial in contempt proceedings for an alleged PPO violation. MCR 3.987(D).)
- Have a copy of the petition attached. MCR 3.920(B)(3)(d).

## E. Proceedings Initiated by Apprehension of Respondent Without a Court Order

MCL 712A.14(1) authorizes apprehension of a minor respondent for an alleged violation of a PPO as follows:

> "Any local police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child . . . for whom there is reasonable cause to believe is violating or has violated a personal protection order issued

> pursuant to [MCL 712A.2(h)] by the court under [MCL 600.2950 and MCL 600.2950a], or for whom there is reasonable cause to believe is violating or has violated a valid foreign protection order."

MCL 712A.14(1) makes no mention of the PPO statutes' provisions for oral notice at the scene of an alleged PPO violation in situations where a minor respondent has not been served with the PPO or received notice of it. The oral notice provisions in the PPO statutes refer to MCL 712A.14 as if it were a separate proceeding; MCL 600.2950(22) and MCL 600.2950a(19) state that "[t]his subsection does not preclude . . . a proceeding under [MCL 712A.14]." The Advisory Committee for this chapter of the benchbook suggests that in the absence of alternative specific oral notice procedures for minor respondents, it is consistent with due process to apply the notice provisions of MCL 600.2950(22) and MCL 600.2950a(19) in cases involving minor respondents. The Committee notes that a PPO is immediately enforceable anywhere in Michigan by any law enforcement agency that has verified the existence of the order. MCL 600.2950(21) and MCL 600.2950a(18).* This immediate enforceability applies to PPOs issued against a minor respondent, regardless of whether the respondent or his or her parent, guardian, or custodian has received notice of the PPO. MCL 600.2950(18) and MCL 600.2950a(15). Thus, the oral notice provisions in the PPO statutes are necessary in all cases to give effect to the immediate enforceability of a PPO consistent with due process. On due process concerns with PPOs, see *Kampf v Kampf*, 237 Mich App 377, 383–385 (1999), discussed at Section 7.5(A). See also MCR 3.982(A), which states that "[a] minor personal protection order is enforceable under MCL 600.2950(22), (25), 600.2950a(19), (22), 764.15b, and 600.1701 et seq."

*See Section 8.5(A) on how the existence of a PPO may be verified.

Once a minor respondent has been apprehended without a court order, the apprehending officer may warn and release the minor. MCR 3.984(A). If the minor is taken into custody, MCL 712A.14(1) and MCR 3.984 provide for the following procedures:

- The apprehending officer shall immediately attempt to notify the parent or parents, guardian, or custodian.
- While awaiting the arrival of the parent or parents, guardian, or custodian, a child under the age of 17 years shall not be held in any detention facility unless the child is completely isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner.
- Unless the child requires immediate detention as provided for in the Juvenile Code, the officer shall accept the written promise of the parent or parents, guardian, or custodian to bring the child to the court at a time fixed therein. The child shall then be released to the custody of the parent or parents, guardian, or custodian. In the context of PPO enforcement proceedings, detention is authorized under the Juvenile Code when the respondent has "allegedly violated a personal protection order and . . . it appears there is a substantial likelihood of retaliation or continued violation." MCL 712A.15(2)(f).

The court must designate a judge, referee or other person who may be contacted by the officer taking a minor under age 17 into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the minor pending preliminary hearing. MCR 3.984(D).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

> **Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6) the issuing jurisdiction bears this expense.

If the supplemental petition is filed in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).

## F. Preliminary Hearings

### 1. Place for Preliminary Hearing

A preliminary hearing (as well as a violation hearing) on an alleged PPO violation may take place in either the issuing jurisdiction or the jurisdiction where a minor respondent was apprehended. MCL 764.15b(6) provides:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued pursuant to [MCL 712A.2(h)], by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state. The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court that issued the personal

> protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county."

See also MCR 3.985(H), which provides that if a minor respondent is apprehended for an alleged PPO violation in a jurisdiction other than the one in which the PPO was issued, and the apprehending jurisdiction conducts the preliminary hearing, if it has not already done so, the apprehending jurisdiction must immediately notify the issuing jurisdiction that the latter may request that the respondent be returned to the issuing jurisdiction for enforcement proceedings.*

*A similar optional notice provision applies at the time the minor is apprehended. See MCR 3.984(E).

## 2. Time for Preliminary Hearing

- *Respondent not detained:* If the minor respondent was not taken into court custody or jailed for an alleged PPO violation, "the preliminary hearing must commence as soon as practicable after the apprehension or arrest, or the submission of a supplemental petition by the original petitioner." MCR 3.985(A)(1).
- *Respondent detained:* If the minor respondent was apprehended with or without a court order for an alleged PPO violation and was taken into court custody or jailed, "the preliminary hearing must commence no later than 24 hours after the minor was apprehended or arrested, excluding Sundays and holidays as defined in MCR 8.110(D)(2), or the minor must be released." MCR 3.985(A)(1).

The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or the minor's parent, guardian, or custodian or for other good cause shown. MCR 3.985(A)(2).

## 3. Required Procedures at Preliminary Hearing

The court shall determine whether the parent, guardian, or custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or custodian if a guardian ad litem or attorney appears with the minor. MCR 3.985(B)(1). A court may appoint a guardian ad litem for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). See MCL 712A.17c(10), which provides:

> "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under [the Juvenile Code]."

See also MCR 3.916(A), which provides that "[t]he court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it." This court rule applies to delinquency and child protective proceedings (MCR 3.901(B)(1)), and appears to apply to PPO enforcement proceedings by virtue of MCR 3.985(B)(1). A guardian ad litem is an officer of the court, not a representative of a party. A guardian ad litem may be called as a witness in the proceeding.

Unless waived by the respondent, the court shall read the allegations in the supplemental petition and ensure that the respondent has received written notice of the alleged violation. MCR 3.985(B)(2). Immediately after reading the allegations, the court shall advise the respondent on the record in plain language of the following rights listed in MCR 3.985(B)(3):

- The respondent may contest the allegations at a violation hearing.
- The respondent has the right to an attorney at every stage in the proceedings. If the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one.
- The respondent has the right to a non-jury trial.
- A referee may be assigned to hear the case unless demand for a judge is filed in accordance with MCR 3.912.
- The respondent may have witnesses against him or her appear at a violation hearing. The respondent may question the witnesses.
- The respondent may have the court order that any witnesses for his or her defense must appear at the hearing.
- The respondent has the right to remain silent, and to not have his or her silence used against him or her.
- Any statement the respondent makes may be used against him or her.

At the preliminary hearing, the court must decide whether to authorize the filing of the supplemental petition and proceed formally, or to dismiss the supplemental petition. MCR 3.985(B)(4).

*MCL 722.821 et seq.

> **Note:** MCR 3.985(B)(4) does not mention proceedings on the consent calendar or alternative services under the Juvenile Diversion Act.* Compare MCR 3.935(B), which provides for these options in delinquency proceedings.

If the court authorizes filing of the supplemental petition, MCR 3.985(B)(6) requires the following:

- The court must set a date and time for the violation hearing, or, if the court accepts a plea of admission or no contest, either enter a dispositional order, or set the matter for dispositional hearing; and
- The court must either release the respondent subject to conditions or order detention of the respondent pending the violation hearing.*

*See Section 8.11(F)(4)–(5) on release conditions and detention.

At the preliminary hearing, the court must state the reasons for its decision to release or detain the minor, on the record or in a written memorandum. MCR 3.985(G).

*See Section 8.11(F)(6).

The court must allow the respondent the opportunity to deny or otherwise plead to the allegations of the supplemental petition. If the respondent wants to enter a plea of admission or nolo contendere, the court shall follow MCR 3.986.* MCR 3.985(B)(5).

If the respondent denies the allegations in the supplemental petition, the court must make the following notices after the preliminary hearing, as required by MCR 3.985(C):

- Notify the prosecuting attorney of the scheduled violation hearing.
- Notify the respondent, respondent's attorney, if any, and respondent's parents, guardian, or custodian of the scheduled violation hearing, and direct the parties to appear at the hearing and give evidence on the contempt charges.
- Notice of hearing must be given by personal service or ordinary mail at least seven days before the violation hearing, unless the respondent is detained, in which case notice of hearing must be served at least 24 hours before the hearing.

### 4. Release of Respondent Subject to Conditions Pending Violation Hearing

MCR 3.985(E) governs the conditional release of a respondent to a parent, guardian, or custodian pending the resumption of the preliminary hearing or pending the violation hearing. In setting release conditions, the court must consider available information on the following factors set forth in this court rule:

- Family ties and relationships;
- The respondent's prior juvenile delinquency or minor PPO record, if any;
- The respondent's record of appearance or nonappearance at court proceedings;
- The violent nature of the alleged violation;
- The respondent's prior history of committing acts that resulted in bodily injury to others;
- The respondent's character and mental condition;
- The court's ability to supervise the respondent if placed with a parent or relative;
- The likelihood of retaliation or violation of the PPO by the respondent; and
- Any other factor indicating the respondent's ties to the community, the risk of nonappearance, and the danger to the respondent or the original petitioner if the respondent is released.

Bail procedure is the same as in juvenile delinquency proceedings. See MCR 3.935(F).

See Sections 4.5–4.6 for a general discussion of safety concerns with conditional release in cases involving allegations of domestic violence.

### 5. Detention Pending Violation Hearing

MCL 712A.15(2) provides as follows:

"Custody, pending hearing, is limited to the following children:

> "(a) Those whose home conditions make immediate removal necessary.
>
> "(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.
>
> "(c) Those who have run away from home.
>
> "(d) Those who have failed to remain in a detention or nonsecure facility or placement in violation of a court order.
>
> "(e) Those whose offenses are so serious that release would endanger public safety.
>
> "(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

MCR 3.985(F)(1) prohibits removal of a minor from his or her parent, guardian, or custodian pending a PPO violation hearing or further court order unless the following circumstances exist:

> "(a) probable cause exists to believe the minor violated the minor personal protection order; and
>
> "(b) at the preliminary hearing, the court finds one or more of the following circumstances to be present:
>
> > "(*i*) there is a substantial likelihood of retaliation or continued violation by the minor who allegedly violated the minor personal protection order;
> >
> > "(*ii*) there is a substantial likelihood that if the minor is released to the parent, with or without conditions, the minor will fail to appear at the next court proceeding; or
> >
> > "(*iii*) detention pending violation hearing is otherwise specifically authorized by law."

A minor in custody may waive the probable cause phase of a detention determination only if the minor is represented by an attorney. MCR 3.985(F)(2).

At the preliminary hearing, the respondent may contest the sufficiency of evidence to support detention by cross-examination of witnesses, presentation

of defense witnesses, or other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. A finding of probable cause may be based on hearsay evidence that possesses adequate guarantees of trustworthiness. MCR 3.985(F)(3).

A respondent who is detained must be placed in the least restrictive environment that will meet the needs of the respondent and the public, and that conforms to the requirements of MCL 712A.15 and 712A.16. MCR 3.985(F)(4).

Regarding the environment for detention in cases involving alleged PPO violations, MCL 712A.15 provides as follows, in pertinent part:

> "(3) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter [governing status offenses] or subsection (2)(c) [regarding runaways] shall not be detained in any secure facility designed to physically restrict the movements and activities of alleged or adjudicated juvenile offenders unless the court finds that the child willfully violated a court order and the court finds, after a hearing and on the record, that there is not a less restrictive alternative more appropriate to the needs of the child. This subsection does not apply to a child who is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter or a child who is not less than 17 years of age and who is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter.
>
> * * *
>
> "(5) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter or subsection (2)(c) shall not be detained in a cell or other secure area of any secure facility designed to incarcerate adults unless either of the following applies:
>
> > "(a) A child is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter [governing delinquency cases] for an offense which, if committed by an adult, would be a felony.
> >
> > "(b) A child is not less than 17 years of age and is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter [governing minor PPOs]."

MCL 712A.15(5)(b) is consistent with provisions of the PPO statutes that impose adult penalties on persons age 17 and over who violate a PPO. See MCL 600.2950(23) and MCL 600.2950a(20). It is also consistent with provisions governing detention conditions for persons age 17 and over who

have been apprehended without a court order for an alleged PPO violation. See Section 8.11(E).

MCL 712A.16 provides as follows:

> "(1) If a juvenile under the age of 17 years is taken into custody or detained, the juvenile shall not be confined in any police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons. However, except as otherwise provided in section 15(3), (4), and (5) of this chapter [subsections 15(3) and (5) are cited above; 15(4) concerns abuse/neglect and delinquency proceedings], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process."*

*See also MCL 764.27a(2) (juveniles confined in a jail or other adult place of detention must be in a room or ward out of sight and sound of adults).

MCL 712A.16(2) provides in pertinent part that the court or court-approved agency may arrange for the boarding of juveniles in any of the following:

- A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court's jurisdiction.
- If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court's jurisdiction.

### 6. Plea of Admission or No Contest

A minor may offer a plea of admission or no contest to the violation of a minor PPO with the court's consent. The court shall not accept a plea to a violation unless it is satisfied that the plea is accurate, voluntary, and understanding. MCR 3.986(A).*

*See Section 8.6(E) for a guilty plea script developed for adult proceedings.

The court may accept a plea of admission or no contest conditioned on preservation of an issue for appellate review. MCR 3.986(B).

The court shall inquire of the parents, guardian, custodian, or guardian ad litem whether there is any reason the court should not accept the plea tendered by the minor respondent. Agreement or objection by the parent, guardian, custodian, or guardian ad litem to a minor's plea of admission or no contest must be placed on the record if that person is present. MCR 3.986(C).

The court may take a plea of admission or no contest under advisement. Before the court accepts the plea, the minor may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the minor to withdraw the plea. MCR 3.986(D).

### 7. Respondent Fails to Appear at Preliminary Hearing

If the respondent was notified of the preliminary hearing and fails to appear for it, the court may issue an order to apprehend the respondent. MCR 3.985(D). This order is to be issued in accordance with MCR 3.983(D), which is discussed at Section 8.11(D)(1). MCR 3.985(D) further provides that:

- If the respondent is under age 17, the court may order him or her to be detained pending a hearing on the apprehension order. If the court releases the respondent, it *may* set bond for the respondent's appearance at the violation hearing.
- If the respondent is 17 years old, the court may order him or her to be confined to jail pending a hearing on the apprehension order. If the court releases the respondent, it *must* set bond for the respondent's appearance at the violation hearing.

## G. Violation Hearing

### 1. Time for Hearing

MCR 3.987(A) provides that upon completion of the preliminary hearing, the court shall set a date and time for the violation hearing if the respondent denies the allegations in the supplemental petition. This rule further provides the following limits for holding the violation hearing:

- If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays.
- If the respondent is not detained, the hearing must be held within 21 days.

### 2. Role of Prosecuting Attorney at Violation Hearing

MCL 764.15b(7) generally provides that the prosecuting attorney shall prosecute the criminal contempt proceeding unless the petitioner retains his or her own attorney for that purpose, or "the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation." This provision specifically applies to all enforcement proceedings against respondents age 18 and older, whether the proceedings were initiated by warrantless arrest or by motion to show cause. *Id*.

In cases involving a PPO with a respondent under age 18, MCR 3.987(B) provides: "If a criminal contempt proceeding is commenced under MCL 764.15b, the prosecuting attorney shall prosecute the proceeding unless the petitioner retains an attorney to prosecute the criminal contempt proceeding. If the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation, the prosecuting attorney need not prosecute the proceeding." Because proceedings under the statute are "commenced" by way of warrantless arrest, it is not clear whether the prosecutor is required under

the court rule to prosecute an action against a minor respondent initiated by filing a supplemental petition. MCL 764.15b(7) requires the prosecutor to prosecute in corresponding adult show cause proceedings; an argument that this provision should apply in cases initiated by supplemental petition could be based on these authorities:

- PPOs with respondents under age 17 are referenced in MCL 764.15b(1)(c), which requires the PPO to state on its face the penalties for violation as a prerequisite to warrantless arrest.
- MCL 712A.2(h) states that the family division of circuit court has jurisdiction over "a proceeding *under* [the PPO statutes, MCL 600.2950 and MCL 600.2950a], in which a minor less than 18 years of age is the respondent." [Emphasis added.] The PPO statutes specifically state that a PPO is enforceable under MCL 764.15b. See MCL 600.2950(25) and MCL 600.2950a(22).
- MCR 3.982(A) states that "[a] minor personal protection order is enforceable under . . . MCL 764.15b."

### 3. Preliminary Matters

There is no right to a jury trial at PPO violation hearings with a minor respondent. MCR 3.987(D).

The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. MCR 3.987(E).

At the violation hearing, the court must do all of the following:

- Determine whether the appropriate parties have been notified and are present. The respondent has the right to be present at the violation hearing along with parents, guardian, or custodian, and guardian ad litem and attorney. The court may proceed in the absence of a parent properly noticed to appear, provided the respondent is represented by an attorney. The original petitioner also has the right to be present at the violation hearing. MCR 3.987(C)(1).
- Read the allegations in the supplemental petition, unless waived. MCR 3.987(C)(2).
- Inform the respondent of the right to the assistance of an attorney, unless legal counsel appears with the respondent. MCR 3.987(C)(3).
- Inform the respondent that if the court determines it might sentence the respondent to jail or place him or her in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one. If the respondent requests to proceed without the assistance of an attorney, the court must advise him or her of the dangers and disadvantages of self-representation, and make sure the respondent is literate and competent to conduct the defense. *Id.*

### 4. Evidence and Burden of Proof

The rules of evidence apply to both criminal and civil contempt proceedings. MCR 3.987(F).

The petitioner or prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt, and the respondent's guilt of civil contempt by a preponderance of the evidence. *Id.*

### 5. Judicial Findings

At the conclusion of the hearing, the court must make specific findings of fact, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 3.987(G).

## H. Dispositional Hearing

### 1. Time Limitations

MCR 3.988(A) provides the following time intervals between the entry of a judgment finding a violation of a minor PPO and any disposition:

- If the minor is not detained, the time interval may not be more than 35 days.
- If the minor is detained, the time interval may not exceed 14 days, except for good cause.

### 2. Conduct of Dispositional Hearing

The petitioner has the right to be present at the dispositional hearing. MCR 3.988(B)(2). The respondent may be excused from part of the dispositional hearing for good cause, but must be present when the disposition is announced. MCR 3.988(B)(1).

At the dispositional hearing, the court may receive all relevant and material evidence, including oral and written reports. The court may rely on such evidence to the extent of its probative value, even though it may not be admissible at the violation hearing. MCR 3.988(C)(1).

The respondent or his or her attorney and the petitioner shall be afforded an opportunity to examine and controvert written reports received by the court. In the court's discretion, they may also be allowed to cross-examine individuals making reports when such individuals are reasonably available. MCR 3.988(C)(2).

No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use at the dispositional phase of material prepared pursuant to a court-ordered examination, interview, or course of treatment. MCR 3.988(C)(3).

# I. Dispositions

## 1. Respondent 17 Years of Age or Older

MCL 600.2950(23) provides for criminal contempt sanctions as follows:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, *shall* be imprisoned for not more than 93 days and may be fined not more than $500.00." [Emphasis added.]

MCL 600.2950a(20) contains the same penalties for violation of a non-domestic stalking PPO.

> **Note:** MCR 3.988(D)(1) states that the court "may" impose a 93-day prison sentence. Since the penalty for a PPO violation is arguably not a matter of "practice and procedure," the Advisory Committee for this chapter of the benchbook suggests that the statutory provision should control. See MCR 1.103. On the nature of criminal contempt, see Section 8.3(A). On probation as a dispositional alternative for a PPO violation, see Section 8.9(A). On awards to compensate for a petitioner's actual losses caused by the PPO violation, see Section 8.9(C).

Respondents imprisoned under the foregoing provisions may be committed to a county jail within the adult prisoner population. MCL 712A.18(1)(e).

MCR 3.988(D)(2)(a) provides for civil contempt sanctions as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall
>
> > "(a) impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721, if the respondent is at least 17 years of age."

See Section 8.9(B)–(C) on sanctions under the statutes cross-referenced in MCR 3.988(D)(2)(a).

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

## 2. Respondent Under Age 17

MCL 600.2950(23) and MCL 600.2950a(20) provide for sanctions against respondents under age 17 who violate a PPO as follows:

> "An individual who is less than 17 years of age who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in [MCL 712A.18]."

MCR 3.988(D) makes no provision for criminal contempt sanctions against a minor respondent under age 17. Consistent with the PPO statutes, however, MCR 3.988(D)(2)(b) subjects such respondents to the dispositional alternatives under the Juvenile Code, as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall . . .
>
> > "(b) subject the respondent to the dispositional alternatives listed in MCL 712A.18, if the respondent is under 17 years of age."

Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

### 3. Dispositional Alternatives Under the Juvenile Code

In cases involving violation of a PPO, MCL 712A.18 provides the following dispositional alternatives, to be ordered as "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained":

> "(a) Warn the juvenile or the juvenile's parents, guardian, or custodian and, except as provided in subsection (7) [governing restitution], dismiss the petition.
>
> "(b) Place the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. As used in this subdivision, 'related' means being a parent, grandparent, brother, sister, stepparent, stepsister, stepbrother, uncle, or aunt by marriage, blood, or adoption. The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile. The court also shall order, as a condition of probation or supervision, that the juvenile shall pay the minimum state cost prescribed by [MCL 712A.18m].

"(c) If a juvenile is within the court's jurisdiction under section 2(a) of this chapter [governing delinquency cases], or under section 2(h) of this chapter for a supplemental petition [governing PPO violations], place the juvenile in a suitable foster care home subject to the court's supervision. . . .

"(d) Except as otherwise provided in this subdivision, place the juvenile in or commit the juvenile to a private institution or agency approved or licensed by the department of consumer and industry services for the care of juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or agency as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates.

"(e) Except as otherwise provided in this subdivision, commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or facility as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates. If a child is not less than 17 years of age and is in violation of a personal protection order, the court may commit the child to a county jail within the adult prisoner population. In a placement under subdivision (d) or a commitment under this subdivision, except to a state institution or a county juvenile agency institution, the juvenile's religious affiliation shall be protected by placement or commitment to a private child-placing or child-caring agency or institution, if available. Except for commitment to the family independence agency or a county juvenile agency, an order of commitment under this subdivision to a state institution or agency described in the youth rehabilitation services act, [MCL 803.301 to 803.309], or in [MCL 400.201 to 400.214], the court shall name the superintendent of the institution to which the juvenile is committed as a special guardian to receive benefits due the juvenile from the government of the United States. An order of commitment under this subdivision to the family independence agency or a county juvenile agency shall name that agency as a special guardian to receive those benefits. The benefits received by the special guardian shall be used to the extent necessary to pay for the portions of the cost of care in the

> institution or facility that the parent or parents are found unable to pay.
>
> "(f) Provide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary.
>
> "(g) Order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under this chapter or that obstructs placement or commitment of the juvenile by an order under this section.
>
> "(h) Appoint a guardian under section 5204 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204, in response to a petition filed with the court by a person interested in the juvenile's welfare. If the court appoints a guardian as authorized by this subdivision, it may dismiss the petition under this chapter.
>
> "(i) Order the juvenile to engage in community service.
>
> "(j) If the court finds that a juvenile has violated a municipal ordinance or a state or federal law, order the juvenile to pay a civil fine in the amount of the civil or penal fine provided by the ordinance or law. Money collected from fines levied under this subsection shall be distributed as provided in [MCL 712A.29]."

Three of the dispositional alternatives listed in MCL 712A.18(1)(k)–(m) do not apply to PPO violators. These are: parental participation in treatment, boot camp, and imposition of a sentence that could have been imposed on an adult for the same offense.

### 4. Orders for Reimbursement to the Court

MCL 712A.18(2) provides that an order of disposition placing a juvenile in or committing a juvenile to care outside of his or her own home and under state or court supervision *shall* contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service. If the court places the juvenile in his or her own home, it *may* order such reimbursement. MCL 712A.18(3). For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003), Sections 11.2–11.3.

If the court appoints an attorney to represent a juvenile, parent, guardian, or custodian, the court may require in an order that the juvenile, parent, guardian, or custodian reimburse the court for attorney fees. MCL 712A.18(5).

**Note:** MCL 712A.18(4) provides for the efficacy of orders directed to a parent or person other than the minor:

> "An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12 and 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."

## 5. Orders for Restitution

Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior. See MCL 600.1721 discussed at Section 8.9(C).

**Note:** Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26 which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

Restitution provisions are also found in MCL 712A.18(7) and 712A.30 for "juvenile offense[s]," which are defined as "violation[s] by a juvenile of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine." MCL 712A.30(1). The applicability of these provisions in PPO enforcement proceedings is unclear. For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003), Section 10.12.

## 6. Reimbursement of Local Authorities

*For discussion of MCL 769.1f, see Section 8.9(D).

The court may order a person found guilty of criminal contempt for violating a PPO to reimburse the state or a local unit of government for expenses incurred in relation to the PPO violation. MCL 769.1f(1)(i).*

## 7. Report to the Michigan State Police

MCL 769.16a(1) requires the clerk of the court to report the disposition of criminal contempt charges for violation of a PPO to the Michigan State Police. Additionally, MCL 28.242(1) requires the Michigan State Police to collect and file the conviction with criminal history information.

### 8. Fingerprinting

MCL 769.16a(5) provides that if fingerprints have not already been taken, the court must order that the fingerprints of the juvenile be taken and forwarded to the Michigan State Police. If the juvenile was taken into custody by a law enforcement officer, then the juvenile should have been fingerprinted at the time that he or she was apprehended. MCL 28.243(1).

### 9. Supplemental Dispositions

MCR 3.989 provides that when a minor placed on probation for violation of a minor PPO has allegedly violated a condition of probation, the court shall follow the procedures for supplemental disposition provided in MCR 3.944, which applies to delinquency proceedings. For more information about such proceedings, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003), Chapter 13.

## J. Appeals

Appeals related to minor PPOs must comply with both MCR 3.709 and 3.993. MCR 3.709(C) provides:

> "(C) From Finding After Violation Hearing.
>
> > "(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.
> >
> > "(2) All other appeals concerning violation proceedings are by application for leave."

MCR 3.993 provides, in pertinent part:

> "(A) The following orders are appealable to the Court of Appeals by right:
>
> > "(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
> >
> > "(2) an order terminating parental rights,
> >
> > "(3) any order required by law to be appealed to the Court of Appeals, and
> >
> > "(4) any final order.
>
> "(B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.

"(C) Except as modified by this rule, chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court. . . ."

## 8.12 Double Jeopardy and Contempt Proceedings

State and federal constitutional guarantees against double jeopardy are of particular concern in contempt proceedings for alleged PPO violations because the behavior at issue can also provide the basis for separate criminal charges. The guarantee against double jeopardy "prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense." *United States v Ursery*, 518 US 267, 273 (1996), citing *Helvering v Mitchell*, 303 US 391, 399 (1938). Consistent with this definition, this section addresses the following issues:

- Do contempt sanctions constitute "punishment" that triggers double jeopardy protections?
- Does double jeopardy apply to contempt proceedings initiated by a private party rather than by the government?
- Once the court has determined that double jeopardy principles apply to a contempt proceeding, when do criminal and contempt proceedings arise from the "same offense" in the context of a PPO enforcement action?

### A. Criminal Contempt Proceedings Trigger Double Jeopardy Protections — Civil Contempt Proceedings Do Not

In determining whether a particular sanction constitutes a "punishment" that triggers double jeopardy protections, the U.S. Supreme Court inquires whether the sanction serves a punitive goal. In making this inquiry, the Court considers whether the Legislature that established the sanction has either expressly or impliedly characterized the penalty imposed as "civil" or "criminal."

"Criminal" sanctions trigger double jeopardy protections. Because **criminal contempt** sanctions clearly have a punitive purpose, the U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. *United States v Dixon*, 509 US 688, 696 (1993). The Michigan appellate courts have not ruled directly on the applicability of double jeopardy to criminal contempt proceedings, but in *People v McCartney (On Remand)*, 141 Mich App 591 (1985), the Court of Appeals applied double jeopardy principles in determining that criminal embezzlement charges could be brought against an individual based on the same conduct that had previously given rise to a conviction of criminal contempt.

**Civil contempt** sanctions are remedial or coercive and so are not typically subject to double jeopardy protections against punishment. Accordingly, the

U.S. Supreme Court has held that an individual may be subjected to both criminal and civil sanctions for the same act, as long as the civil sanctions serve a purpose distinct from punishment. In *Yates v United States,* 355 US 66, 74 (1957), the U.S. Supreme Court upheld the imposition of both civil and criminal contempt sanctions for a single, continuing act of contempt, reasoning that "the civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent."

> **Note:** Although the Legislature's characterization of a penalty as "civil" will typically indicate that double jeopardy protections do not apply, the U.S. Supreme Court has held that it will override the legislative intent in cases where the civil remedy has been "transformed" into a criminal penalty. For more discussion of this question, see *Hudson v United States,* 522 US 93 (1997); *People v Artman*, 218 Mich App 236, 246-247 (1996); and *People v Duranseau*, 221 Mich App 204, 207 (1997).

## B. Criminal Contempt Proceedings Initiated by Private Parties May Trigger Double Jeopardy Protections

The U.S. Supreme Court has stated that the prohibition against double jeopardy is a prohibition against punitive action taken by the *government* — "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v Halper*, 490 US 435, 451 (1989), overruled on other grounds, *Hudson v United States, supra*. Nonetheless, the Court extended the application of double jeopardy principles to criminal contempt proceedings initiated by a private party in *United States v Dixon*, 509 US 688 (1993). In *Dixon*, a District of Columbia trial court issued a civil protection order restraining a husband from assaulting or threatening his estranged wife. After the order issued, the wife filed three separate motions to have her husband held in contempt for violating it. The wife eventually prosecuted the violations at trial without government participation, and the husband was convicted of criminal contempt. When the U.S. Attorney later obtained an indictment charging the husband with criminal assault and other crimes arising from the conduct that violated the protection order, the husband asserted that the contempt conviction barred the subsequent criminal prosecution. Applying the "same elements" test for double jeopardy articulated in *Blockburger v United States*, 284 US 299, 304 (1932), the Supreme Court concluded that the criminal contempt conviction barred subsequent prosecution of some, but not all, of the criminal charges at issue in the case.

The Supreme Court's decision in *Dixon* did not address the Court's earlier statement in *Halper* that double jeopardy protections are not triggered by litigation between private parties. The criminal nature of the penalties imposed in *Dixon* appears to be the distinguishing factor between these two cases.* The Court noted in *Dixon* that the purpose of the trial court's injunctive order was to restrain an individual from criminal acts — "an historically anomalous use of the contempt power" not permitted at common

**Halper* involved civil monetary sanctions sought by the federal government.

law. 509 US at 694. Although this novel use of the court's injunctive powers was initiated by a private party, it appears that the injunction's crime-preventive purpose furthered an inherent state interest sufficient to trigger double jeopardy protections.

## C. The "Same Offense" — Michigan and Federal Principles

Once a court has determined that double jeopardy protections apply (i.e., that the contempt proceeding may result in punitive sanctions imposed to vindicate a government interest), it is faced with the question whether the contempt involves the "same offense" as any penal charges arising from the same behavior. This "same offense" inquiry will arise in two different contexts, because US Const, Am V, and Michigan Const 1963, art 1, §15, afford a criminal defendant two different protections against double jeopardy:

- The **protection against successive prosecution** prohibits a second prosecution of the same offense after an acquittal or conviction. In Michigan, this protection requires that the prosecutor join all charges arising from the "same transaction" for a single trial. *People v White*, 390 Mich 245, 257-259 (1973), and *People v Garcia*, 448 Mich 442, 448 (1995) (opinion by Justice Riley).
- The **protection against multiple punishments** prevents the court from sentencing a defendant more than once for the same offense, by requiring it to confine its sentence within the limits set by the Legislature. *People v Sturgis*, 427 Mich 392, 399 (1986).

The Michigan Supreme Court has articulated a separate standard for each of the foregoing double jeopardy protections. In *United States v Dixon*, 509 US 688 (1993), however, a majority of the U.S. Supreme Court applied a single standard to each protection. The rest of this section briefly describes these standards and explores how they operate in the context of PPO enforcement actions.

> **Note:** In *United States v Dixon*, *supra*, Justices Blackmun, White, and Souter dissented from the majority's decision to adopt a single-standard double jeopardy test and would have continued to apply separate standards to subsequent prosecution and multiple punishment cases. For this reason, their opinions (particularly Justice Blackmun's and Justice White's) may be helpful in the context of Michigan's two-pronged standard.

### 1. Michigan's Protection Against Successive Prosecution

As noted above, the guarantee against successive prosecution seeks to prevent the prosecutor from initiating or continuing a criminal proceeding after an acquittal or conviction. To protect criminal defendants from having to defend multiple proceedings, the Michigan Supreme Court held in *People v White*, 390 Mich 245, 257-259 (1973), that all charges arising from the "same transaction" must be tried together in a single trial. In *Crampton v 54-A District Judge*, 397 Mich 489, 501-502 (1976), the Court articulated a two-

pronged test for determining whether charges arise from the "same transaction":

- If criminal intent is required for both of the offenses involved, they will arise from the same transaction if there is a "*continuous time sequence and display [of] a single intent and goal.*"
- If one or more of the offenses does not involve criminal intent, they will arise from the same transaction if they are "*part of the same criminal episode,"* and *"involve laws intended to prevent the same or similar harm or evil*, not a substantially different, or a very different kind of, harm or evil." [Emphasis added.] See also *People v Mackle*, 241 Mich App 583, 593 (2000) (double jeopardy prohibition not violated where defendant was subject to criminal prosecution for kidnapping in Michigan and Canada).

The Michigan appellate courts have not yet applied the foregoing standards in a case where a defendant faces penal and criminal contempt charges arising from the same conduct. An argument that double jeopardy protections would not require joinder of such charges would focus on the different interests vindicated by penal and contempt sanctions, as follows:

- If the alleged penal violation involves criminal intent, the first prong of the *Crampton* test will apply because criminal contempt also requires proof of intent to violate the court's order. *People v Matish,* 384 Mich 568, 572 (1971), and *People v Kurz,* 35 Mich App 643, 652 (1971). Under the first-prong *Crampton* scenario, joinder of criminal and criminal contempt charges is not required because these charges do not reflect "a single intent and goal." The intent requirement for the penal violation involves intentional conduct as proscribed in the statute. This intent will always be different from the criminal contemnor's intention to violate a court order.
- If the alleged penal violation does not involve criminal intent, the second prong of the *Crampton* "same transaction" test will apply. Under this test, the contempt and penal offenses will be part of the same transaction if they involve laws intended to prevent the same or similar harm or evil. An argument that contempt and penal offenses do not meet this test can be based on *In re Murchison*, 340 Mich 151, 155-156 (1954), rev'd on other grounds 349 US 133 (1955). In this case, the Michigan Supreme Court commented that separate criminal perjury and criminal contempt proceedings may be instituted based on the same false testimony because each type of proceeding is intended to address a different harm:

  > "The fact that perjury is a crime for which one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject matter of a punishment for contempt; *the one act constituting two offenses, one against the State and the other against the court*." [Emphasis added.]

  See also Justice Blackmun's opinion in *United States v Dixon, supra*, 509 US at 742 ("The purpose of contempt is not to punish an offense against

the community at large but rather to punish the specific offense of disobeying a court order.")

For a contrary view, see Justice White's opinion in *United States v Dixon supra*, 509 US at 723-726. Justice White reasoned that a court's interest in preserving its authority cannot be separated from the state's interest in crime prevention for double jeopardy purposes, because the courts and the state draw their authority to punish offenders from the same source of power. Unlike the majority of Justices in *Dixon*, Justice White opined that a criminal contempt conviction would bar subsequent prosecution of all criminal offenses arising from the same conduct that gave rise to the contempt:

> "The fact that two criminal prohibitions promote different interests may be indicative of legislative intent and, to that extent, important in deciding whether cumulative punishments imposed in a single prosecution violate the Double Jeopardy Clause. . . . But the cases decided today involve instances of successive prosecutions in which the interests of the *defendant* are of paramount concern. To subject an individual to repeated prosecutions exposes him to embarrassment, expense and ordeal . . . violates principles of finality . . . and increases the risk of a mistaken conviction. That one of the punishments is designed to protect the court rather than the public is, in this regard, of scant comfort to the defendant." 509 US at 724. [Emphasis in original.]

### 2. Michigan's Protection Against Multiple Punishment

The multiple punishment strand of the guarantee against double jeopardy ensures that courts confine their sentences within the limits set by the Legislature. *People v Sturgis, supra*, 427 Mich at 399. Accordingly, the Legislature's intent — as determined from the subject, language, and history of a statute — is determinative in cases involving multiple punishment. *People v Robideau*, 419 Mich 458, 486-488 (1984); *People v Mitchell,* 456 Mich 693 (1998); *People v Walker*, 234 Mich App 299, 308 (1999).

In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to whatever other criminal penalties may apply for a separate criminal offense:

> "The criminal penalty provided for under [the PPO statutes] may be imposed in addition to [any] penalty that may be imposed for [any other] criminal offense arising from the same conduct." MCL 600.2950(23) and MCL 600.2950a(20).

Similarly, MCL 600.1745 provides:

> "Persons proceeded against according to the provisions of this chapter [which governs civil and criminal contempt], shall also be liable to indictment for the same misconduct, if it be an indictable

> offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in imposing sentence."

In *People v Coones*, 216 Mich App 721, 727-728 (1996), the Michigan Court of Appeals held that separate convictions of aggravated stalking and criminal contempt for violation of a temporary restraining order were not multiple punishments in violation of double jeopardy, even though they were based upon the same conduct. The guarantee against double jeopardy does not prevent the Legislature from imposing separate penalties for what would otherwise be a single offense. The determinative inquiry is thus whether the Legislature *intended* to impose cumulative punishment for similar crimes. *People v Robideau, supra*, 419 Mich at 485. With regard to aggravated stalking, the Legislature has clearly expressed its intent to impose multiple punishments for aggravated stalking and criminal contempt. MCL 750.411i(6) states:

> "A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct."*

*The misdemeanor stalking statute contains the same provision, MCL 750.411h(5).

### 3. *United States v Dixon* — the "Same Offense" in Federal Courts

The double jeopardy analysis by a majority of the U.S. Supreme Court in *United States v Dixon*, 509 US 688 (1993) has limited usefulness under the Michigan Constitution because a majority of the Court rejected the notion that separate standards should apply to subsequent prosecution and multiple punishment cases. Instead, the *Dixon* majority proceeded from the assumption that a single "same elements" test applies in all cases.* Nonetheless, *Dixon's* "same offense" analysis will be discussed here because Michigan courts may be called upon to employ it in the context of a double jeopardy challenge brought under the Fifth Amendment to the U.S. Constitution. See *People v Setzler*, 210 Mich App 138 (1995).

*The *Dixon* majority specifically rejected a two-pronged double jeopardy analysis by overruling *Grady v Corbin*, 495 US 508 (1990), which had articulated a separate standard for each type of case. 509 US at 704.

After his conviction of criminal contempt for violating a civil protection order against domestic violence, one of the two *Dixon* defendants was criminally charged with simple assault (Count I), threatening to injure another (Counts II-IV), and assault with intent to kill (Count V). Counts I and V were based on events for which the defendant had been held in contempt, and Counts II-IV were based on events for which he had been acquitted of contempt. A majority of the U.S. Supreme Court held that the criminal contempt conviction barred prosecution of the simple assault charges only — there was no double jeopardy bar to prosecution of the other four charges, however. The Court reached this conclusion based on the "same elements" test articulated in *Blockburger v United States*, 284 US 299, 304 (1932).

Under the *Blockburger* test, two offenses are not the same for purposes of double jeopardy if each offense contains an element not contained in the

other. Applying *Blockburger* to the facts in *Dixon*, the Supreme Court majority found that where a court order restrains an individual from committing a penal offense that is incorporated into the order, "the 'crime' of violating a condition of [the court order] cannot be abstracted from the 'element' of the violated condition." *United States v Dixon, supra*, 509 US at 698. Accordingly, the defendant's subsequent simple assault charge was barred under the *Blockburger* test because the earlier protection order had incorporated the penal provision against simple assault, and the defendant had been convicted of violating it in the contempt proceeding. The underlying simple assault charge in the contempt proceeding was thus "a species of lesser-included offense." *Id.* As to the remaining counts, *Blockburger* was no bar to prosecution because they contained elements separate from the elements of the contempt charges. Counts II-V required more specific threats than those described in the protection order provision. Count V required proof of intent to kill, unlike the anti-assault provision in the protection order.

> **Note:** Since *Dixon* was decided, Michigan's appellate courts have continued with their two-pronged double jeopardy analysis in most cases. See *People v Harding*, 443 Mich 693, 703-705 (1993); *People v White*, 212 Mich App 298, 305-306 (1995); and *People v McMiller*, 202 Mich App 82 (1993). An exception is *People v Setzler*, *supra*, in which the Court of Appeals applied the analysis in *Dixon* to a successive prosecution challenge based on the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The Michigan Supreme Court has restricted the *Blockburger* test to a useful (but not determinative) role in multiple punishment cases. *People v Sturgis*, *supra*, 427 Mich at 409. See also *People v Walker*, 234 Mich App 299, 305-309 (1999), rejecting a *Blockburger* analysis.

## 8.13 Full Faith and Credit for Other Jurisdictions' Protection Orders

Every state in the United States and many tribal jurisdictions have enacted statutes authorizing courts to issue civil protection orders against domestic violence. The federal Violence Against Women Act ("VAWA") requires Michigan courts to give full faith and credit to qualified protection orders issued in other states and in tribal jurisdictions (as well as in the District of Columbia, and any commonwealth, territory, or possession of the United States). In general, a protection order issued in accordance with the law of the issuing jurisdiction is entitled to full faith and credit under the VAWA. Enforcement measures upon violation are governed by the law of the enforcing jurisdiction.

This section describes the criteria that a protection order must meet to be entitled to full faith and credit under the VAWA, and provides brief examples of how courts are to enforce qualifying orders issued in other jurisdictions. This section also provides information on Michigan statutes enacted to

implement the full faith and credit provisions of VAWA. In reviewing this section, the reader is cautioned that the discussion here is only intended as a starting point for understanding the issues arising under the VAWA full faith and credit provisions; an exhaustive treatment of these concerns is beyond the scope of this benchbook. This is particularly true with respect to questions involving Native Americans and Native American lands. Due to the complexity of the law in this area, the Advisory Committee for this chapter of the benchbook recommends that Michigan judges consult with local tribal judges, magistrates, or court officers in resolving questions regarding Native Americans and Native American lands. For a general discussion of the relationships between state, tribal, and federal laws, see Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government,* 79 Judicature 118 (1995), and Feldman and Withey, *Resolving State-Tribal Jurisdictional Dilemmas,* 79 Judicature 154 (1995). On tribal criminal jurisdiction, see Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction,* 14 BYU J Pub L 173 (2000).

Finally, the reader should be aware that a violation of another jurisdiction's protection order in Michigan may be subject to federal criminal prosecution. In addition to providing for full faith and credit for protection orders, the VAWA makes it a federal criminal offense to travel in interstate or foreign commerce or enter or leave Indian country with the intent to violate a protection order. 18 USC 2262(a)(1). It is also a federal crime to cause another to travel in interstate or foreign commerce or enter or leave Indian country by force, coercion, duress, or fraud and thereby engage in conduct violating a protection order. 18 USC 2262(a)(2).

> **Note:** For assistance in providing domestic violence service providers and other members of the public with information about VAWA's full faith and credit provisions, see *An Advocate's Guide to Full Faith and Credit for Orders of Protection* (Pennsylvania Coalition Against Domestic Violence, 2001). This brochure is available at the Coalition's web site at www.pcadv.org (under publications) (last visited December 2, 2003).

## A. When Is a Protection Order Entitled to Full Faith and Credit?

Under 18 USC 2265, a sister state or tribal protection order must be given full faith and credit if: 1) the issuing court had jurisdiction over the parties and subject matter under its own laws; and 2) the person subject to the order had notice and a reasonable opportunity to be heard regarding issuance of the order. Prior registration in the enforcing jurisdiction and notice of such registration to the restrained individual are not prerequisites to according full faith and credit. 18 USC 2265 provides:

> "(a) Any protection order issued that is consistent with [18 USC 2265(b)] by the court of one State or Indian tribe (the issuing State

or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

"(b) A protection order issued by a State or tribal court is consistent with this subsection if —

"(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and

"(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

. . .

"(d) Notification and registration.

"(1) Notification. A State or Indian tribe according full faith and credit to an order by a court of another State or Indian tribe shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State or tribal jurisdiction unless requested to do so by the party protected under such order.

"(2) No prior registration or filing as prerequisite for enforcement. Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction."

Michigan courts must enforce tribal protection orders as provided in 18 USC 2265 rather than under MCR 2.615, which generally provides for enforcement of tribal judgments. The court rule does not apply to judgments or orders that federal law requires be given full faith and credit. MCR 2.615(D).

The Michigan Legislature enacted legislation to incorporate the federal full faith and credit provisions of VAWA. MCL 600.2950j(1) is substantially similar to 18 USC 2265 and provides that a valid foreign protection order must be accorded full faith and credit and is subject to the same enforcement procedures and penalties as if it were issued in Michigan. A foreign protection order is "valid" is all of the following criteria are met:

> "(a) The issuing court had jurisdiction over the parties and subject matter under the laws of the issuing state, tribe, or territory.
>
> "(b) Reasonable notice and opportunity to be heard is given to the respondent sufficient to protect the respondent's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided to the respondent within the time required by state or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." MCL 600.2950i(1).

MCL 600.2950*l*(1) states:

> "(1) Law enforcement officers, prosecutors, and the court must enforce a foreign protection order other than a conditional release order or probation order issued by a court in a criminal proceeding in the same manner that they would enforce a personal protection order issued in this state under [MCL 600.2950] or [MCL 600.2950a] or [MCL 712A.2(h)], unless indicated otherwise in this section."

There are three affirmative defenses to enforcement of a foreign protection order. MCL 600.2950i(2) states:

> "All of the following may be affirmative defenses to any charge or process filed seeking enforcement of a foreign protection order:
>
> "(a) Lack of jurisdiction by the issuing court over the parties or subject matter.
>
> "(b) Failure to provide notice and opportunity to be heard.
>
> "(c) Lack of filing of a complaint, petition, or motion by or on behalf of a person seeking protection in a civil foreign protection order."

The examples in the following discussion illustrate the application of the jurisdictional and due process criteria of 18 USC 2265 and MCL 600.2950j(1).

### 1. The Issuing Court "Has Jurisdiction Over the Parties and Matter" Under Its Own Law

A sister state or tribal protection order will be entitled to full faith and credit under the VAWA only if the issuing court had personal and subject matter jurisdiction under the laws of its own jurisdiction.* In Michigan, the question of **personal jurisdiction** has been of particular concern where one of the parties to a protection order is a member of an Indian tribe. The following examples illustrate some of the questions that have arisen in these cases.

*18 USC 2265(b)(1) and MCL 600.2950j(1)(a).

♦ **Example A**

A Native American petitions a Michigan court for a PPO under Michigan law. Michigan courts have jurisdiction to hear such actions because Native Americans are citizens of the United States, and of the states and counties where they reside. US Const, Am XIV; 8 USC 1401(b). Accordingly, Michigan orders protecting Native American petitioners are entitled to full faith and credit if the other requirements of the VAWA are met.

**Note:** PPO petitions requesting restraints that would affect property on tribal lands raise concerns over the issuing court's subject matter jurisdiction. This issue is discussed below in Example E.

♦ **Example B**

A tribal court issues a protection order restraining a non-Indian respondent from abusive behavior against a tribal member. Tribal jurisdictions may authorize their courts to issue such orders as long as there is no criminal sanction for violation; under current federal law, tribal jurisdictions have no independent criminal jurisdiction over non-Indians. *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) (tribal courts cannot exercise criminal jurisdiction over non-Indians except in a manner acceptable to Congress). To exercise civil jurisdiction over non-Indians, a tribe must show that the non-Indian either: 1) engaged in consensual relations with the tribe or an individual tribal member; or 2) took an action that had a direct effect on the core integrity of the tribe. See *Nevada v Hicks*, 533 US 353; 150 L Ed 2d 398; 121 S Ct 2304, 2309-2310 (2001) and *Strate v A-1 Contractors*, 520 US 438 (1997) for further discussion of the legal standard governing the exercise of a tribe's civil jurisdiction over non-Indians. See also 18 USC 2265(e), which provides that for purposes of according full faith and credit, "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." Although some non-Indian respondents have argued that the lack of criminal sanctions makes tribal protection orders unenforceable in Michigan courts, the Advisory Committee for this chapter of the benchbook suggests that a tribal protection order must be given full faith and credit in Michigan courts as long as it is issued in accordance with tribal law. The manner of enforcement is governed by Michigan law under the VAWA, so that a tribe's inability to impose criminal sanctions for violation of its protection orders is irrelevant to the question of eligibility for full faith and credit. See Section 8.13(C) for more discussion of how enforcing states are to give full faith and credit to foreign protection orders.

With respect to **subject matter jurisdiction**, enforcing courts in Michigan have been particularly concerned with whether the restraints or other conditions imposed by the foreign protection order are authorized by laws of the foreign jurisdiction. If so, the foreign order is entitled to full faith and credit, even if the restraints or conditions it imposes would not be authorized in the enforcing jurisdiction.

- **Example C**

  Pursuant to MCL 600.2950(1), a petitioner obtains a Michigan personal protection order against a respondent with whom she had a dating relationship. She then relocates to another jurisdiction in which the courts may not issue protection orders based on dating relationships. If the respondent follows her to the other jurisdiction and violates the Michigan order there, the court of the other jurisdiction must give the Michigan order full faith and credit, even though it could not have imposed restraints on the respondent itself.

- **Example D**

  The defendant in *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), was restrained by an order issued in New Jersey under the New Jersey Prevention of Domestic Violence Act. This order was issued principally in favor of the defendant's estranged wife, but also prohibited the defendant from harassing the couple's children. The defendant was arrested and criminally charged in New York for harassing his daughter in that state. In deciding whether it had to give full faith and credit to the New Jersey order with respect to the defendant's daughter, the New York criminal court looked to the New Jersey statute under which the order was issued and to the definition of "protection order" in 18 USC 2266.* The court found that the New Jersey statute specifically authorized the courts of that state to issue orders protecting members of the complainant's household. The New York court also determined that the definition of "protection order" in 18 USC 2266 was broad enough to include all persons lawfully included in protection orders under the law of the issuing state.

*See Section 8.13(B) for more on the definition of a "protection order" for VAWA purposes.

- **Example E**

  A Native American initiates a PPO action in a Michigan court under Michigan's PPO statutes. The respondent, her husband, is also a Native American. The petition requests that the respondent be restrained from entering the couple's home. As discussed above, the Michigan court has personal jurisdiction over the Native American petitioner. However, the Michigan court may lack personal jurisdiction over the respondent and subject matter jurisdiction over property located on tribal lands. The Michigan court in this case needs to know whether the couple's home is located on tribal lands. If the home is on tribal lands, the Michigan court lacks subject matter jurisdiction to issue the relief requested. If the home

is on Michigan lands, the Michigan court would have jurisdiction to issue the PPO.

**Note:** The Advisory Committee for this chapter of the benchbook suggests that in complex cases such as this one, Michigan judges should contact local tribal judges, magistrates, or court officers to resolve questions regarding the jurisdiction of each court.

### 2. The Restrained Party Has Been Given "Reasonable Notice and Opportunity to Be Heard"

The second criterion for full faith and credit is that the party subject to the protection order be given "reasonable notice and opportunity to be heard . . . sufficient to protect that person's right to due process." 18 USC 2265(b)(2) and MCL 600.2950i(1)(b). The statute further provides that where the protection order is issued ex parte, "notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." *Id*.

*See Section 6.5(H) on service of a Michigan PPO.

The VAWA's notice requirement has particular significance for Michigan ex parte PPOs, which are effective and immediately enforceable within Michigan upon a judge's signature without regard to service or notice to the respondent. See MCL 600.2950(9), (12) and MCL 600.2950a(6), (9). Despite their immediate efficacy in this state, Michigan's ex parte PPOs will not be entitled to full faith and credit in other jurisdictions until the respondent has received notice and an opportunity to be heard under Michigan law.*

A case illustrating the need for appropriate notice in interstate protection order proceedings is *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997). In this case, a criminal prosecution was initiated in the Criminal Court of the City of New York to enforce a civil protection order issued in New Jersey. The New York court refused to accord the New Jersey order full faith and credit because the New Jersey "Return of Service" form was insufficient to establish service. This form stated that the restrained party had been given a copy of the order by personal service but failed to give a date of service. It also lacked a signature and identifying description of the person who made service. Based on these insufficiencies, the New York court granted the defendant's motion to dismiss the criminal proceedings, with leave to the prosecution to submit a superseding information. The prosecution subsequently cured the defect by obtaining an affidavit from a New Jersey court official establishing that the defendant had been afforded due process in New Jersey, and by submitting a superseding information establishing proper service.

## B. What Types of Orders Are Entitled to Full Faith and Credit?

The "protection orders" governed by the VAWA full faith and credit provision are defined as follows:

> "'[P]rotection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection." 18 USC 2266(5). See also MCL 600.2950h(a), which contains a substantially similar definition.

The definitions set forth in 18 USC 2266(5) and MCL 600.2950h(a) encompass the following types of orders:

- Protection orders that carry only civil sanctions for violation in the issuing jurisdiction, such as tribal orders issued against non-Indians. 18 USC 2266 and MCL 600.2950h(a) contain no requirement that an order be enforceable by criminal penalties in the issuing jurisdiction. See Section 8.13(A)(1), Example B for an example involving a tribal order issued against a non-Indian.
- Orders protecting persons other than the petitioner if the law of the issuing jurisdiction permits the court to include such persons in its protection orders. See *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), discussed in Section 8.13(A)(1), Example D.
- Michigan PPOs. The definition of "protection order" in 18 USC 2266(5) is broad enough to encompass both domestic relationship and non-domestic stalking PPOs.

A conditional release order or a probation order* issued in a criminal proceeding for the protection of a named individual is not included in the above listing. MCL 600.2950*l*(2) provides:

*See Sections 4.4-4.6 on conditional release orders and Section 4.15 on probation orders.

> "A foreign protection order that is a conditional release order or a probation order issued by a court in a criminal proceeding shall be enforced pursuant to [MCL 600.2950m], [MCL 764.15(1)(g)], the uniform criminal extradition act, . . . MCL 780.1 to 780.31, or the uniform rendition of accused persons act, . . . MCL 780.41 to 780.45."

Violation of a foreign protection order that is a conditional release order or a probation order* issued by a court in a criminal proceeding is a misdemeanor punishable by imprisonment for not more than 93 days or a fine of $500.00, or both. MCL 600.2950m.

*For information regarding probation violations, see Section 4.15.

18 USC 2266(5) and MCL 600.2950h(a) specifically exclude orders for support or child custody issued under state divorce and child custody laws from their full faith and credit provisions. Mutual protection orders are also

ineligible for full faith and credit under both the VAWA and MCL 600.2950k(2). The following discussion explains.

### 1. Orders for Child Custody or Support

*See Section 7.7 on this issue.

The VAWA's definition of "protection order" specifically excludes "a support or child custody order *issued pursuant to State divorce or child custody laws*." [Emphasis added.] This exclusion does *not* apply to support and custody provisions issued under state protection order statutes; the emphasized language was added to the statute in 2000 to clarify that child custody and support provisions within valid protection orders are to be given full faith and credit under the VAWA. See Pub L No 106-386, Div B, Title I, §1107(d), 114 Stat 1464. MCL 600.2950j(2) also provides that a child custody or support provision contained in a valid foreign protection order must be accorded full faith and credit. Although Michigan's PPO statutes do not specifically authorize courts to make provisions for child custody or support in PPOs,* protection order statutes in 44 other states and the District of Columbia specifically permit courts to make provision for emergency support and custody within their civil protection orders. See, e.g., Ala Code §30-5-7(c)(4); Ky Rev Stat Ann §403.750(1)(e), (4); NM Stat Ann §40-13-5(A)(2).

*See Sections 13.12-13.14 for more discussion of the PKPA.

Although custody and support provisions in protection orders are entitled to full faith and credit under the VAWA, an unsettled question remains as to whether such provisions must additionally meet the requirements of other federal and state statutes that govern full faith and credit. Regarding child custody, the Parental Kidnapping Prevention Act, 28 USC 1738A, requires states to accord full faith and credit to sister state custody orders that meet certain jurisdictional and notice criteria.* Under 28 USC 1738A(b)(3), the description of custody orders entitled to full faith and credit is broad enough to include custody provisions contained within civil protection orders. The statute defines "custody determination" as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications."

28 USC 1738B requires states to accord full faith and credit to sister state and tribal support orders made consistently with its provisions. This statute's definition of "child support order" is broad enough to include support provisions contained within a protection order. 28 USC 1738B(b) states that "child support order" means:

> "(A) . . . a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and
>
> "(B) includes —
>
> (*i*) a permanent or temporary order; and
>
> (*ii*) an initial order or a modification of an order."

Effective April 1, 2002, Michigan adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),* MCL 722.1101 et seq. The UCCJEA requires Michigan courts to recognize and enforce other states' custody determinations. MCL 722.1303. See also MCL 722.1312. A "child-custody determination" is defined as follows:

*See Sections 13.2-13.11 for more discussion of the UCCJEA.

> "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support* or other monetary obligation of an individual." MCL 722.1102(c).

*Child support orders may be enforced across state lines pursuant to the UIFSA, MCL 552.1101, et seq.

The UCCJEA also provides that a court of this state may take temporary emergency jurisdiction if the child is present in this state and it is necessary in an emergency to protect the child because the child, a sibling of the child, or the child's parent is subjected to or threatened with mistreatment or abuse. MCL 722.1204.

> **Note**: An order issued under "temporary emergency" jurisdiction is entitled to interstate enforcement and nonmodification under the UCCJEA only when the notice and hearing requirements of the UCCJEA are fulfilled. See the Model UCCJEA, Section 204, Comment.

The Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq. also requires Michigan courts to recognize valid child support orders issued by other states and Indian tribes. A "support order" under the UIFSA could include a support provision contained within another state's protection order. The Act defines "support order" as "a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, spouse, or former spouse that provides for monetary support, health care, arrearages, or reimbursement and may include related costs and fees, interest, income withholding, attorney fees, and other relief." MCL 552.1104(i).*

*For more on interstate enforcement of support orders, see Goelman, et al, Interstate Family Practice Guide: A Primer for Judges, §§307, 409-410, and Michigan Family Law Benchbook, §§5.49-5.60 (Inst for Continuing Legal Education, 1999).

## 2. Mutual Orders

Limitations on the VAWA's full faith and credit requirement arise where a court issues a mutual protection order against both parties, and the respondent was the petitioner's spouse or intimate partner. 18 USC 2265(c) provides:

> "(c) Cross or counter petition. A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if —
>
> > "(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

> "(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order."

See MCL 600.2950k(2) for similar provisions. The portion of a mutual order restraining the respondent is entitled to full faith and credit regardless of whether the restraint on the petitioner meets the foregoing criteria.

"Spouse or intimate partner" is defined in 18 USC 2266(7) as follows:

> "The term "spouse or intimate partner" includes--
>
> "(A) for purposes of--
>
> "(*i*) sections other than 2261A,* a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; and . . .
>
> "(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides."

*18 USC 2261A governs interstate stalking.

MCL 600.2950k(3) defines "spouse or intimate partner" for the purposes of a foreign protection order, as any of the following:

- a spouse or former spouse,
- an individual with whom the petitioner has had a child in common,
- an individual residing or having resided in the same household as the petitioner, or
- an individual with whom the petitioner has or has had a dating relationship.*

*See Section 6.3(A) for the definition of "dating relationship."

Michigan law prohibits mutual personal protection orders but allows for separate correlative orders that meet the federal criteria. See Section 7.4(E).

## C. How Does the Enforcing Court Give Full Faith and Credit to a Sister State or Tribal Order?

If a tribal or sister state protection order meets the jurisdictional and notice requirements of the VAWA's full faith and credit provision, the order must be enforced "as if it were the order of the enforcing State or tribe." 18 USC 2265(a). This means that a Michigan court enforcing a foreign jurisdiction's protection order should impose on the respondent the same sanctions for violation that are available for PPO violations under Michigan law. These

sanctions may differ from those that would have been imposed in the issuing jurisdiction. The following examples illustrate.

- **Example A**

  The defendant in *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), was restrained by an order issued in New Jersey under the New Jersey Prevention of Domestic Violence Act. The order expressly provided that violation may constitute criminal contempt under New Jersey law. After violating the order in the state of New York, the defendant was arrested and charged in a New York proceeding with criminal contempt in the second degree, a misdemeanor under New York law. He requested dismissal of the charges, asserting that the order could only be criminally enforced in a New Jersey court. The New York court disagreed, finding that it was obligated to enforce the order by imposing New York penal sanctions for the violation.

- **Example B**

  A Michigan circuit court issues a PPO against a non-Indian respondent who lives in a Michigan city. The PPO protects a non-Indian petitioner residing in the same Michigan city and prohibits the respondent from beating, molesting, or wounding the petitioner. The respondent follows the petitioner to a casino located on tribal land lying wholly within the exterior limits of the State of Michigan and physically assaults the petitioner in the casino parking lot.

  The respondent may be arrested by a tribal police officer who is acting in accordance with his or her authority under tribal law. See *Duro v Reina*, 495 US 676, 697 (1990) (a tribal officer may restrain persons disturbing the public order on tribal land). The tribal court may then assert its civil jurisdiction over the respondent in this case under the full faith and credit provisions of the VAWA. 18 USC 2265(e) provides that for purposes of according full faith and credit, "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."

  Under current federal law, the tribal court may not impose criminal penalties on the respondent. See *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978), and Section 8.13(A)(1), Example B. Criminal offenses between non-Indians that are committed on tribal land are also subject to prosecution by state and/or federal governments, depending upon the offense. *State v Schmuck*, 850 P 2d 1332, 1335 (Wash, 1993). However, a tribal officer has the power to arrest and transport an offender to federal or state authorities in this situation. See *Duro v Reina*, *supra,* and *State v Schmuck*, *supra,* 850 P2d at 1339. In this case, a federal criminal prosecution may occur under 18 USC 2262(a)(1), which prohibits traveling in interstate or foreign commerce or entering or leaving Indian

country with the intent to violate a protection order. State jurisdiction over crimes between non-Indians in Indian country lies in the state within which the reservation is situated. See *United States v McBratney*, 104 US 621 (1882) and OAG 1979-1980, No 5714, p 800, n 3 (May 29, 1980).

**Note:** In a case such as this one, it is important to recognize that there may be an established cross-jurisdictional protocol or agreement between tribal, state, and federal authorities.

♦ **Example C**

A member of a federally-recognized Indian tribe obtains a protection order from her tribal court. This order restrains her intimate partner, a non-Indian, from stalking her. The order further states that penalties for violation include exclusion from tribal lands and civil fines; no criminal penalties are listed. The order is issued in compliance with tribal law and served on the respondent. The tribal law governing protection orders allows the respondent an opportunity to be heard sufficient to protect his due process rights under federal law. After obtaining her order, the petitioner takes up residence on the tribal trust lands of a second federally recognized Indian tribe. She continues to work on the lands of her own tribe, however, and drives between her work and residence five days a week, crossing over land in the state of Michigan as she does so (without leaving the exterior boundaries of Michigan). The respondent continues his stalking behavior after issuance of the tribal protection order. Over a two-week period, he puts threatening notes on the petitioner's car as it is parked at her home and at her work locations. He also follows closely behind her in his car whenever she drives between her home and work. After he runs her car off the road on a highway in a Michigan county, the petitioner files a motion for an order to show cause in the Michigan circuit court for the county where the highway is located, seeking enforcement of her tribal protection order.

*See Section 8.13(A) on these questions.

The Advisory Committee for this chapter of the benchbook suggests that Michigan criminal contempt sanctions would apply to enforce the tribal protection order in this case. The order is entitled to full faith and credit in the Michigan court because it was issued in accordance with tribal law and with the due process requirements of 18 USC 2265.* Although some would argue that the lack of criminal sanctions makes tribal protection orders unenforceable in Michigan courts, the Advisory Committee suggests that the tribe's inability to impose criminal sanctions for violation is not relevant because the manner of enforcement is governed by Michigan law, not by tribal law. See Section 8.13(A)(1), Example B on the tribe's authority to issue this order.

18 USC 2265 does not provide for the enforcing court to modify a foreign jurisdiction's protection order. Lutz and Bonomolo, *How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection,* 16 Pace L Rev 9, 19 (1995).

In 1997, the FBI established a National Crime Information Center ("NCIC") database for protection orders, enabling law enforcement officers and courts to receive accurate, timely information about active protection orders issued in participating jurisdictions. As of the publication of this benchbook, NCIC serves criminal justice agencies in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Canada. In Michigan, access to NCIC files must be made through the Law Enforcement Information Network ("LEIN"). Although all 50 states are served by NCIC, the only sure way for a court to ascertain the continuing validity of an order issued in another jurisdiction is to contact the issuing court. Such communication is also a matter of courtesy that may facilitate protection of the victim in both the issuing and enforcing jurisdictions.

## D. Immunity From Liability for an Action Arising From the Enforcement of a Foreign PPO

MCL 600.2950*l*(10) states:

> "A law enforcement officer, prosecutor, or court personnel acting in good faith are immune from civil and criminal liability in any action arising from the enforcement of a foreign protection order. This immunity does not in any manner limit or imply an absence of immunity in other circumstances."

## E. Facilitating Enforcement of Michigan PPOs in Other Jurisdictions

In light of the federal requirements for full faith and credit described above, Michigan courts can facilitate enforcement of Michigan PPOs in other jurisdictions by taking the following steps:*

*Many of these suggestions are found in *Full Faith & Credit: A Judge's Bench Card* (National Council of Juvenile & Family Court Judges, 2000)

- Help the parties to better understand the scope of the order by informing them orally and in writing that the order is enforceable in all U.S. states and territories, and on tribal lands.
- Issue orders that are explicit, specific, unambiguous, comprehensive, and legible. Avoid vague, unenforceable terms such as "reasonable."
- Clearly cite the statutory authority under which the order is issued. This citation — coupled with a recitation of the relevant jurisdictional facts — will assist the enforcing court in its assessment of the order under the VAWA jurisdictional criteria.
- Specify whether the respondent had notice and an opportunity to be heard.
- To eliminate questions about full faith and credit, ensure that PPOs affecting parental rights conform to the federal Parental Kidnapping Prevention Act, 28 USC 1738A and the Uniform Child Custody Jurisdiction and Enforcement Act, MCL 722.1101 et seq., as well as to the requirements of the VAWA.*

*See Section 7.7 on PPOs affecting parental rights. On the PKPA and UCCJEA, see Chapter 13.

- Provide the court's contact information for verification purposes, including the judge's name and the court's phone number and address.
- Make specific findings of abuse and include specific prohibitions against abuse.
- Specify the duration of the order and its expiration date.
- Specify that the order is entitled to full faith and credit under the VAWA.
- Specify relevant federal laws in the PPO (e.g., that federal prosecution may result from interstate travel to violate the order, or possession of a firearm while subject to the order).
- Provide the parties with a certified copy of the order.
- At the request of the enforcing court, consult with that court to clear up ambiguities, verify validity, establish the status of service, etc.
- Enter orders as soon as possible into LIEN.